

No. 15681

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation, Appellant,

vs.

ANDERSON CONSTRUCTION CO., INC., a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

SEP 25 1957

PHILLIPS & VAN ORDEN CO.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Seattle 4, Washington,

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WRIGHT, INNIS, SIMON AND TODD,

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Seattle 1, Washington,

Attorneys for Appellee.

United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 4093

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ANDERSON CONSTRUCTION CO., INC., a
Corporation, Defendant.

COMPLAINT

The plaintiff for its complaint against the defendant alleges that:

I.

The plaintiff United States Fidelity and Guaranty Company at all times material was and now is a corporation created and continued as such by and under the laws of the state of Maryland, of which it is a citizen and resident.

II.

The defendant Anderson Construction Co., Inc. at all times material was and now is a corporation created and continued as such by and under the laws of the state of Washington, of which it is a citizen and resident, with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and fully authorized to engage in

business as a surety within the state of Washington, to which has heretofore been paid all prescribed fees.

IV.

As hereinafter disclosed, this is a civil action in which the matter in controversy between the plaintiff and the defendant exceeds the sum of \$3000, exclusive of interest and costs.

V.

The defendant and others signed and delivered to the plaintiff a written agreement dated June 3, 1955, applying for execution by plaintiff, as surety, of certain bonds to the United States of America in connection with a certain construction contract known as "DA 95-507-ENG-826 Elmendorf & Ladd AFB", said written agreement containing the joint and several written promise of defendant and others to pay forthwith the premium for said bonds in the specified sum of \$47,753.72, a copy of said written agreement marked Exhibit A being attached hereto and embodied herein.

VI.

Pursuant to said written agreement, the plaintiff executed, on behalf of the defendant and other applicants, in favor of United States of America, two bonds, dated May 31, 1955, viz: a performance bond (Government "Standard Form 25") in the sum of \$3,085,178.50, and a payment bond (Government "Standard Form 25A") in the sum of \$2,500,000, copies of which marked, respectively, Exhibit B

and Exhibit C, are attached hereto and embodied herein.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

While payments upon said premium have been made to and received by the plaintiff in amounts aggregating the sum of \$23,876.86, the balance of said premium remains unpaid in the like sum of \$23,876.86, which is long overdue.

IX.

Despite demand having been heretofore made, the defendant has failed and refused to make payment of said delinquent balance, for which it individually is legally obligated.

Wherefore, the plaintiff prays for judgment against the defendant in the sum of \$23,876.86 plus interest at the legal rate of six per cent per annum from the date of said bonds until the date of payment, with costs and disbursements to be taxed.

SUMMERS, BUCEY & HOWARD,

/s/ LANE SUMMERS,
Attorneys for Plaintiff.

EXHIBIT "A"

Contract Application

671679

73000-12-2045-55

United States Fidelity and Guaranty Company
Baltimore, Maryland

Applicants must give full and explicit data under the following heads, and must supply a copy of the Contract for filing with this application. As this requirement is essential to the proper preparation of the bond and the Company's judgment of the case, care in complying with same will expedite the issuance of the bond.

1. Full name of applicant: Islands Construction Company, Inc., a Washington corp., Anderson Construction Co., Inc., a Washington corporation, and Montin-Benson Corporation, a Delaware corporation, as joint venturers of Seattle, Washington.

* * * * *

5. Amount of Bond. Bid: \$..... Performance: \$3,085,178.50). Payment: \$2,500,000.00).

6. To whom given? Give full name and business address. If to a corporation, give exact corporate title: U S A.

7. Nature of Contract: DA 95-507-ENG-826 Elmendorf & Ladd A F B.

8. Contract price: \$6,170,357.00.

* * * * *

10. Names of Other Bidders: (a) Kuney Johnson. Bid. \$6,217,839.

* * * * *

16. Date work is to be commenced: Now. Completed: 11/1/56.

17. Penalty for non-completion at above date Premium for completion before above date.....

18. Payments when and how made? Mo.

19. Are payments to be made in cash? Yes.

20. Percentage reserved from payments until completion: 10%.

21. Have you ever had your application for Contract Bond declined by any Company? Ans.....

22. Have you ever applied elsewhere for this Bond? If so, with what result?.....

23. Contracts on Hand: Nil.

* * * * *

Each of the undersigned hereby warrants that the foregoing statements, made to induce United States Fidelity and Guaranty Company (hereinafter called the Company) to execute or procure the bond herein applied for (the term bond being used herein to include all bonds herein applied for and every continuation, renewal, substitute or new bond), are true, and, should the Company execute or procure said bond, hereby agrees as follows: First, to pay or cause to be paid to the Company in advance a premium of \$..... for the bid or proposal bond (the same to be credited on the premium for the performance bond if executed or

procured by the Company), and a premium of \$47,753.72 for the performance bond, if any, being at the rate of various per thousand dollars of the amount of (bond) (contract price) stated above for the (term of two years or fraction thereof) (first year or fraction thereof) and an additional premium at the rate of \$..... per thousand dollars of the (bond) (uncompleted portion of the contract) annually in advance thereafter until written evidence satisfactory to the Company of its discharge from all liability by reason of having executed or procured said bond shall be furnished to the Company at its Home Office in the City of Baltimore, Maryland; and, should the amount of bond or contract price be increased above the amount thereof stated above, to pay or cause to be paid to the Company an additional premium, at the same rate per thousand dollars of such increased amount, and, should the amount of bond or contract price be decreased below the amount thereof stated above, the Company will, on demand and in accordance with its manual rates and regulations, refund any excess of premium paid; if the contract carries a guaranty or maintenance provision extending the bond beyond acceptance of the work, or if the bond applied for herein guarantees maintenance, each of the undersigned agrees to pay or cause to be paid to the Company in advance a maintenance premium of \$..... for the entire term thereof, said maintenance premium being at the rate per annum of \$..... per thousand dollars of the amount of (bond) (con-

tract price) stated above; Second, to indemnify the Company against all loss, damages, claims, suits, costs and expenses whatever, including court costs and counsel fees at law or in equity, or liability therefor, which the Company may sustain or incur by reason of: executing or procuring said bond, or making any investigation on account of same, or procuring its release or evidence thereof from same, or defending, prosecuting or settling any claim, suit or other proceeding which may be brought or threatened by or against any of the undersigned or the Company in connection with same or any collateral security hereunder or any of the agreements herein contained, and to place the Company in funds before it shall be required to make any payment; Third, to assign and convey and does hereby assign and convey to the Company as collateral to secure the obligations herein and any other indebtedness or liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, all the right, title and interest of the undersigned in and to: (a) said contract and any change, addition, substitution or new contract (including all retained percentages, deferred payments, earned moneys and all moneys and properties that may be due or become due under said contract, change, addition, substitution or new contract), and every sub-contract let or that may be let in connection therewith and every bond securing the same, and every claim which the undersigned may have or acquire against any person furnishing or agreeing to furnish labor, material,

supplies, machinery, tools or equipment in connection with said contract or any sub-contract; and (b) all machinery, equipment, plant, tools, supplies and materials which are now or may hereafter be about or upon the site of said work, including supplies and materials now or hereafter purchased for or chargeable to said contract which may be in process of construction, or in storage elsewhere, or in transportation to said site; such assignment to be effective as of the date of the construction contract but only in event of (1) any breach of any of the agreements herein contained or of said contract or performance bond or of any other bond executed or procured by the Company on behalf of the applicant herein, or (2) any assignment by the applicant for the benefit of creditors, or the appointment, or any application for the appointment, of a receiver or trustee for said applicant, whether insolvent or not, or (3) any proceeding or the exercise of any right which deprives the applicant of the use of any of the machinery, equipment, plant, tools, supplies or material referred to; Fourth, that in the event of any breach of said contract or performance bond by any of the undersigned, the Company shall have the right, at the expense of the undersigned, to complete said contract or to contract for the completion thereof or to consent to the reletting or completion thereof by the obligee in said bond; Fifth, that liability hereunder shall extend to and include all amount paid by the Company in good faith under the belief that it was liable therefor or that such payments were necessary to

protect any of its rights hereunder or to avoid or lessen its liability, and the vouchers or other evidence of such payments shall be conclusive evidence of the fact and extent of the liability of the undersigned to the Company in regard thereto; Sixth, to waive and does hereby waive all right to claim any property, including homestead, as exempt from levy, execution, attachment, sale or other legal process under the constitution or law of the United States of America or the Dominion of Canada, or of any state, territory or province; Seventh, that the undersigned shall not be relieved of liability hereunder by the Company's consenting to any change, addition, substitution or new obligation in connection with said bond or any contract covered thereby, notice of any such change, addition, substitution or new obligation being hereby waived; Eighth, that the Company shall have the right to decline to execute said bond or bonds or any of them (including the right, if it shall execute said bid or proposal bond, to decline to execute any or all other bonds herein applied for); Ninth, that the Company may fill up any blanks left, or correct any errors in filling up any blanks, herein or in the said foregoing statements, and such insertions or corrections shall be *prima facie* correct; Tenth, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising; Eleventh, that

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nothing herein contained shall be considered or construed to waive, abridge, or diminish any right or remedy which the Company might have if this instrument were not executed; Twelfth, that each corporate undersigned, if any, warrants that it is financially interested in the execution of said bond and in the performance of the obligation which said bond is given to secure and that it is fully empowered to obligate itself hereby; Thirteenth, that this agreement shall be liberally construed so as to fully protect and indemnify the Company; Fourteenth, that the above agreements shall bind the undersigned and the heirs, personal representatives, successors and assigns thereof jointly and severally and shall inure to the benefit of any co-surety or reinsurer of the Company on said bond.

Signed and sealed as of June 3, 1955.

If corporation sign here.

[Seal] ANDERSON CONSTRUCTION CO.,
 INC.,

By Martin Anderson, President.

If corporation sign here.

[Seal] ISLANDS CONSTRUCTION CO.,
 INC.,

By Vern J. Oja, Secretary.

If corporation sign here.

MONTIN-BENSON CORPORA-
TION,

By Wm. V. Montin, President.

Attest:

Karl K. Katz, Asst. Secretary.

* * * * *

EXHIBIT "B"

(Copy)

PERFORMANCE BOND

Standard Form 25. Revised November 1950. Prescribed by General Services Administration General Regulation No. 5.

Date bond executed: 5-31-55.

Principal: Islands Construction Company, Inc., a Washington Corporation, Anderson Construction Co., Inc., a Washington Corporation and Montin-Benson Corporation, a Delaware Corporation, as joint venturers of Seattle, Washington.

Surety: United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having its principal office in Baltimore, Maryland.

Penal Sum of Bond: Three Million, Eighty-five Thousand, One Hundred Seventy-eight Dollars and 50/100ths (\$3,085,178.50).

Contract No.: DA 95-507-ENG-826.

Date of Contract: 5-31-55.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain con-

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tract with the Government, numbered and dated as shown above and hereto attached;

Now Therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * * * *

Corporate Principal:

ANDERSON CONSTRUCTION CO.,
INC.,

Central Bldg., Seattle, Wash.,

By Martin Anderson,
President.

Attest: Mary E. Galbraith, Asst. Secty.

Corporate Surety:

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
300 Central Bldg., Seattle, Wash.,
By J. C. Beeson,
Attorney-in-Fact.

Attest: C. Fox.

The rate of premium on this bond is Various per thousand.

Total amount of premium charged, \$47,753.72.

Certificate as to Corporate Principal

I, Mary E. Galbraith, certify that I am the Assistant Secretary of the corporation named as principal in the within bond; that Martin Anderson, who signed the said bond on behalf of the principal, was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

.....

EXHIBIT "C"

(Copy) PAYMENT BOND

Standard Form 25A. Revised November 1950. Prescribed by General Services Administration General Regulation No. 5.

Date bond executed: 5-31-55.

Principal: Islands Construction Company, Inc., a Washington Corporation, Anderson Construction Co., Inc., a Washington Corporation and Montin-

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Benson Corporation, a Delaware Corporation, as joint venturers of Seattle, Washington.

Surety: United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having its principal office in Baltimore, Maryland.

Penal Sum of Bond: Two Million Five Hundred Thousand Dollars and No/100 (\$2,500,000.00).

Contract No.: DA 95-507-ENG-826.

Date of Contract: 5-31-55.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract with the Government, numbered and dated as shown above and hereto attached;

Now Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * * * *

Corporate Principal:

ANDERSON CONSTRUCTION CO.,
INC.,

Central Bldg., Seattle, Wash.,

By Martin Anderson,
President.

Attest: Mary E. Galbraith, Asst. Secty.

Corporate Surety:

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
300 Central Bldg., Seattle, Wash.,

By J. C. Beeson,
Attorney-in-Fact.

Attest: C. Fox.

The rate of premium on this bond is.....
per thousand.

Total amount of premium charged: Premium included in charge for Performance Bond.

Certificate as to Corporate Principal

I, Mary E. Galbraith, certify that I am the Assistant Secretary of the corporation named as principal in the within bond; that Martin Anderson, who signed the said bond on behalf of the prin-

cipal, was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

.....

* * * * *

[Endorsed]: Filed February 21, 1956.

[Title of District Court and Cause.]

ANSWER

Answering plaintiff's complaint, defendant says:

I.

Defendant admits Paragraphs I, II, III and IV of the complaint.

II.

Except as hereinafter expressly set forth, defendant admits the allegations of Paragraph V.

III.

Defendant admits Paragraphs VI and VII.

IV.

Defendant admits that plaintiff has received amounts aggregating the sum of \$23,876.86, as alleged in Paragraph VIII, and denies the remainder of the said paragraph.

V.

Defendant denies Paragraph IX.

Affirmative Defense

I.

Exhibit A, referred to in Paragraph V of the

complaint, was not complete at the time of signature thereof by defendant and the others whose names appear as signatories to the instrument as pleaded, in that the amount of the premium was left blank, and the figures "47,753.72," which now appear therein were inserted by a person or persons to the defendant unknown after the same was signed and in the possession of plaintiff.

II.

The bonds (Exhibits B and C) were not delivered to defendant or its joint venturers, or to the obligees, on the date (5-31-55) inserted therein, but were delivered at a later date. The said bonds were dated back to correspond with the date of the contract referred to therein, which said contract was not actually executed until substantially later than the said date, and was dated back to the time of the notification to defendant and its joint venturers of the acceptance of their bid.

III.

At the time defendant and its joint venturers signed Exhibit A aforesaid, the agent of the plaintiff requested said defendant and its joint venturers to sign the said application, with the amount of the bond premium left blank, upon the representation and understanding that plaintiff was about to reduce its rates for executing such bonds as surety, and that a sum would be inserted in the said blank space appropriate to giving defendant and its joint venturers the benefit of such reduced rate.

IV.

Said rates were shortly thereafter reduced. In accordance with the said reduced rates the correct total premium for the execution of the said bonds was and is the sum of \$35,576.79.

V.

On or about September 19, 1955, defendant and its joint venturers paid to plaintiff, through its agents, on account of the obligation for the premium on the said bonds, the sum of \$11,938.43, and on or about November 21, 1955, a like sum, or a total of \$23,876.86.

VI.

On or about December 28, 1955, said defendant tendered to agents of the plaintiff two checks, in the amounts respectively of \$2,805.73 and \$8,894.20, or a total of \$11,699.93, being the total amount of the balance of the premium owing to plaintiff from said defendant and its joint venturers on account of the obligation aforesaid. Said checks were drawn on banks in which the drawors had at the said time funds, so that the said checks would have been promptly paid in lawful money of the United States if presented for payment, but the said checks were returned to the joint venturers by agents of the plaintiff, with the assertion that the same were rejected by plaintiff because, and solely because, they were tendered in full discharge of the obligation herein sued upon.

VII.

At all times herein mentioned the joint venturers,

of whom this defendant is one, have been ready, willing and able to pay the amount which is justly owing to plaintiff. They have paid the sums aforesaid and have made the tender aforesaid, which they have informed agents of the plaintiff that they were keeping good, and said joint venturers, on behalf of defendant, will deposit the sum of \$11,699.93 with the Clerk of the Court as soon as the Court will enter an order directing the Clerk to accept the same in keeping the aforesaid tender good.

Wherefore, defendant prays that the plaintiff's complaint be dismissed, and that the Court award to the defendant its costs and attorneys' fees.

WRIGHT, INNIS, SIMON & TODD,
/s/ ARTHUR E. SIMON,
Attorneys for Defendant.

Acknowledgment of Receipt of Copy Attached.
[Endorsed]: Filed July 12, 1956.

[Title of District Court and Cause.]

STIPULATION AND ORDER REGARDING TENDER INTO COURT

It is hereby stipulated by the parties to the above cause through their respective undersigned attorneys that the said defendant may deposit with the Clerk of this Court, the sum of Eleven Thousand Six Hundred Ninety-nine Dollars and Ninety-three Cents (\$11,699.93) in connection with the tender referred to in the Answer of the said defendant and that the Court may enter this order directing

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the Clerk to accept the check of the defendant in the said amount and to hold the proceeds thereof pursuant to the further order of the Court herein.

Dated this 12th day of July, 1956.

/s/ LANE SUMMERS,
SUMMERS, BUCEY & HOWARD,
Attorneys for Plaintiff.

/s/ ARTHUR E. SIMON,
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Defendant.

It Is So Ordered. Dated this 12th day of July, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ PRISCILLA A. TOWNSEND,
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Defendant.

[Endorsed]: Filed July 12, 1956.

[Title of District Court and Cause.]

**PLAINTIFF'S MOTION FOR LEAVE TO
AMEND ITS COMPLAINT**

- The plaintiff, invoking F.R.C.P. Rule 15(a), hereby moves for order of court granting leave to amend its complaint largely by adding to and inserting in the same allegations contained in Article VIII, as disclosed by its proposed Amended Com-

plaint, a copy of which is hereto attached as a part hereof.

Dated this 16th day of August, 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AMENDED COMPLAINT

The plaintiff for its amended complaint against the defendant alleges that:

I.

The plaintiff United States Fidelity and Guaranty Company at all times material was and now is a corporation created and continued as such by and under the laws of the state of Maryland, of which it is a citizen and resident.

II.

The defendant Anderson Construction Co., Inc. at all times material was and now is a corporation created and continued as such by and under the laws of the state of Washington, of which it is a citizen and resident, with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and fully authorized to engage in business as a surety within the state of Washington, to which has heretofore been paid all prescribed fees.

IV.

As hereinafter disclosed, this is a civil action in which the matter in controversy between the plaintiff and the defendant exceeds the sum of \$3000, exclusive of interest and costs.

V.

The defendant and others signed and delivered to the plaintiff at Seattle, Washington, a written agreement dated June 3, 1955, applying for execution by plaintiff, as surety, of certain bonds to the United States of America in connection with a certain construction contract known as 'DA 95-507-ENG-826 Elmendorf & Ladd AFB', said written agreement containing the joint and several written promise of defendant and others to pay forthwith the premium for said bonds in the specified sum of \$47,753.72, a copy of said written agreement marked Exhibit A being embodied herein as attached to plaintiff's original complaint.

VI.

Pursuant to said written agreement, the plaintiff executed, on behalf of the defendant and other applicants, in favor of United States of America, two bonds, dated May 31, 1955, viz: a performance bond (Government "Standard Form 25") in the sum of \$3,085,178.50, and a payment bond (Government "Standard Form 25A") in the sum of \$2,500,000, copies of which marked, respectively, Exhibit B and Exhibit C being embodied herein as attached to plaintiff's original complaint.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

1. The plaintiff, in so engaging in its said business as a surety, at all times material was and now is subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79) as amended, in consequence of provisions contained in §.01.04 and §.11.08(4) thereof.
2. Pursuant to the requirements of such Insurance Code (§.19.04 and §.19.05) the plaintiff caused to be filed in the office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on said bonds, which same having been accepted and approved by said Insurance Commissioner (§.19.06) became effective and binding as of the 30th day of April, 1951, and subsequently continued effective and binding until after the 20th day of July, 1955.
3. Said rates were applicable to the premium on said bonds and were effective and binding as to both the plaintiff and the defendant where and when the defendant became obligated upon said written agreement dated June 3, 1955 (Exhibit A, attached to the plaintiff's original complaint) and also where and when the plaintiff became obligated as surety upon said two bonds dated May 31, 1955, executed in favor of the United States of America

(Exhibit B and Exhibit C, attached to the plaintiff's original complaint).

4. The premium for said bonds in said sum of \$47,753.72, which the defendant promised to pay according to said written agreement, was rightly computed upon and correctly calculated at said premium rates then so effective and binding.

5. Said Insurance Code at all times material did and now does contain prohibitions as follows:

“Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.”
(Section .30.14.)

“Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not law-

fully entitled as a licensed agent, broker, or solicitor. * * *” (Section .30.17.)

6. The premium for said bonds in said sum of \$47,753.72 was and is the only amount of premium legally chargeable by the plaintiff and legally payable by the defendant.

IX.

While payments upon said premium have been made to and received by the plaintiff in amounts aggregating the sum of \$23,876.86, the balance of said premium remains unpaid in the like sum of \$23,876.86, which is long overdue.

X.

Despite demand having been heretofore made, the defendant has failed and refused to make payment of said delinquent balance, for which it individually is legally obligated.

Wherefore, the plaintiff prays for judgment against the defendant in the sum of \$23,876.86 plus interest at the legal rate of six per cent per annum from the date of said bonds until the date of payment, with costs and disbursements to be taxed.

SUMMERS, BUCEY & HOWARD,
LANE SUMMERS,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY

The plaintiff, pursuant to previous order of court, for its reply to the "Affirmative Defense" in the Defendant's answer, admits, denies and alleges that:

I.

The plaintiff denies the averments in Paragraph I.

II.

The plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph II, except only as hereafter expressly admitted:

The plaintiff admits said bonds (Exhibit "B" and Exhibit "C") were not delivered to the defendants or its joint venturers or the obligee on the 31st day of May 1955. However, the plaintiff alleges said bonds were delivered to and received by the obligee before or on the 17th day of June 1955, after earlier execution thereof both by the defendant, as principal, and by the plaintiff, as surety.

III.

The plaintiff denies the averments in paragraph III.

IV.

The plaintiff denies the averments in Paragraph IV except only as hereafter expressly admitted:

The plaintiff admits its rates of premium for bonds within the same classification as those in-

volved were reduced on the 20th of July 1955, such reduced rates to become operative only after that date.

V.

The plaintiff admits the averments of Paragraph V.

VI.

The plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph VI except only as hereafter expressly denied or expressly admitted:

The plaintiff admits tender to it by the defendant of two checks—one being for \$2,805.73 and one being for \$8,894.20—amounting to \$11,699.93.

The plaintiff denies the sum of \$11,699.93 as being the total amount of the balance of premium owing to it by the defendant.

The plaintiff denies said checks were rejected by it and returned to the defendant solely because they were so tendered in full discharge of the defendant's obligation. But the plaintiff admits said checks were rejected by it and returned to the defendant because they were so tendered in full discharge of the defendant's obligation and also because they were calculated upon the basis of rates of premium not applicable to said written agreement (Exhibit "A") and not applicable to said bonds (Exhibit "B" and "C").

VII.

The plaintiff denies the averments of Paragraph VII except only as hereafter expressly admitted:

The plaintiff admits the defendant was prepared to keep good its tender of \$11,699.93, which amount was deposited for that purpose with the Clerk of the above entitled court on the 12th of July, 1956.

VIII.

The plaintiff, in engaging in its said business as a surety, in accepting said written agreement from the defendant (Exhibit "A") and in executing said bonds (Exhibit "B" and Exhibit "C") at all times material was and is subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79) as amended, in consequence of provisions contained in §.01.04 and §.11.08 (4) thereof.

IX.

Pursuant to the requirements of such Insurance Code (§.19.04 and §.19.05) the plaintiff caused to be filed through a licensed rating organization in the office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on said bonds, which same having been accepted and approved by said Insurance Commissioner (§.19.06) became effective and binding as of the 30th day of April, 1951, and subsequently continued effective and binding until after the 20th day of July, 1955.

X.

Said rates were applicable to the premium on said bonds and were effective and binding as to both the plaintiff and the defendant when the defendant became obligated upon said written agree-

ment dated June 3, 1955 (Exhibit "A"), and when the plaintiff became obligated as surety upon said two bonds dated May 31, 1955, executed in favor of the United States of America (Exhibit "B" and Exhibit "C"), and also when the United States of America, after receiving and accepting the defendant's construction contract known as "DA-95-507-ENG-826 Elmendorf & Ladd A F B" with said bonds, authorized and directed the defendant to proceed with work thereunder on the 17th of June 1955.

XI.

The premium for said bonds in said sum of \$47,753.72, which the defendant promised to pay according to said written agreement, was rightly computed upon and correctly calculated at said premium rates then so effective and binding.

XII.

Said Insurance Code at all times material did and does contain mandates and prohibitions as follows:

"1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes."

"3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect,

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except as is provided by section .10.09.” (Section .19.04.)

“1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.” (Section .19.05.)

“1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.” (Section .19.28.)

“Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” (Section .30.14.)

“Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully

entitled as a licensed agent, broker, or solicitor.
* * * * " (Section .30.17.)

XIII.

The premium for said bonds in said sum of \$47,753.72 was and is the only amount of premium legally chargeable by the plaintiff and legally payable by the defendant.

Wherefore, the plaintiff having fully replied prays for judgment against the defendant as sought by its complaint.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS BY DEFENDANT

The plaintiff, invoking FRCP Rule 36, requests the defendant to make, within twelve (12) days after service hereof, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, admissions as to the genuineness of documents and the truth of statements, as follows:

1. That the document (of which copy marked "Exhibit 1" is attached hereto, being the plaintiff's premium rates as filed with the Insurance Commis-

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sioner of the State of Washington for effect after the 30th of April, 1951, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C"), is genuine.

2. That the document (of which copy marked "Exhibit 2" is attached hereto) being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the 20th day of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C"), is genuine.
3. That the plaintiff's said premium rates as specified by "Exhibit 1" continued to be effective until superseded by the plaintiff's said premium rates as specified by "Exhibit 2".
4. That the amount of premium, according to the plaintiff's claim in the sum of \$47,753.72 was calculated by applying the rates as specified in "Exhibit 1".
5. That the amount of premium, according to the defendant's contention, in the sum of \$35,576.79, was calculated by applying the rates as specified in "Exhibit 2".
6. That the defendant's written agreement with the plaintiff (Exhibit "A") was in all respects complete before the 17th of June 1955.
7. That said bonds (Exhibit "B" and Exhibit "C") were fully executed both by the defendant,

as principal, and by the plaintiff, as surety, before the 17th of June, 1955.

8. That said bonds (Exhibit "B" and Exhibit "C") were delivered by or for the defendant and received by or for the obligee, the United States of America, before or on the 17th of June, 1955.

9. That said bonds (Exhibit "B" and Exhibit "C") were accepted in behalf of the United States of America as obligee before or on the 17th of June, 1955.

10. That notification to the joint venturers, including the defendant, to proceed with performance under their construction contract, identified as "DA-95-507-ENG-826 Elmendorf & Ladd A F B", was issued by or for the United States of America on the 17th of June, 1955.

11. That said bonds (Exhibit "B" and Exhibit "C") became binding obligations of the defendant as principal and of the plaintiff as surety not later than the 17th of June, 1955.

12. That the bid submitted by or for the joint venturers, including the defendant, to induce said construction contract, identified as "DA - 95 - 507 - ENG-826 Elmendorf & Ladd A F B", was calculated in part upon consideration of premium for bonds required thereby, at premium rates as specified in "Exhibit 1".

13. That the bid submitted by or for the joint venturers, including the defendant, to induce said construction contract, identified as "DA - 95 - 507 -

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ENG-826 Elmendorf & Ladd A F B", was calculated in part upon consideration of premium for bonds required thereby, in the sum of \$47,753.72 or thereabouts, and not in the sum of \$35,576.79, or thereabouts.

Dated this 21st day of September 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,

Attorneys for Plaintiff.

EXHIBIT No. 1

Revision of April 30, 1951

CONTRACT BONDS

Where Contract Price is \$2,500,000 or more.

Basic Rate Table

Stipulated time for completion not over 24 months or 744 calendar days: (For the first 14 days, exceeding 24 months, there is no percentage increase).

Contract Price	Rate per M for the full term
First \$2,500,000	\$8.00
Next 2,500,000	7.67
Next 2,500,000	7.33
Over 7,500,000	6.67

Supplemental Rate Table

Stipulated time for completion—25 months or 745 calendar days to 60 months or 1840 calendar days:

Compute term premium at rates given in Basic Rate Table above. To this computation add the percentage in the Supplemental Rate Table below for the total number of days in the stipulated time for completion.

Calendar Days	Add to Complete %	Calendar Days	Add to Complete %	Calendar Days	Add to Complete %
745 to 775.... 1		1,135 to 1,140....20		1,491 to 1,494....32	
776 to 803.... 2		1,141 to 1,168....21		1,495 to 1,498....33	
834 to 934.... 3		1,169 to 1,199....22		1,499 to 1,502....34	
835 to 864.... 5		1,200 to 1,229....22		1,503 to 1,505....35	
865 to 895.... 6		1,230 to 1,260....23		1,506 to 1,534....36	
896 to 925.... 7		1,261 to 1,290....24		1,535 to 1,565....36	
926 to 956.... 8		1,291 to 1,321....24		1,566 to 1,595....37	
957 to 987....10		1,322 to 1,352....25		1,596 to 1,626....37	
988 to 1,017....11		1,353 to 1,382....26		1,627 to 1,656....37	
1,018 to 1,048....12		1,383 to 1,413....26		1,657 to 1,687....38	
1,049 to 1,078....13		1,414 to 1,443....26		1,688 to 1,718....38	
1,079 to 1,109....15		1,444 to 1,474....27		1,719 to 1,748....39	
1,110 to 1,116....16		1,475 to 1,478....28		1,749 to 1,779....39	
1,117 to 1,122....17		1,479 to 1,482....29		1,780 to 1,809....39	
1,123 to 1,128....18		1,483 to 1,486....30		1,810 to 1,840....40	
1,129 to 1,134....19		1,487 to 1,490....31			

Example:

Contract price, \$10,000,000; Stipulated time for completion, 1,505 calendar days.

First \$ 2,500,000 @ \$8.00.....	\$20,000.00
Next 2,500,000 @ 7.67.....	19,175.00
Next 2,500,000 @ 7.33.....	18,325.00
Next 2,500,000 @ 6.67.....	16,675.00
<hr/>	
\$10,000,000	\$74,175.00
Add 35% for Term (1,505 days).....	25,961.25
<hr/>	
Term Premium	\$100,136.25

EXHIBIT No. 2

*New Page, July 20, 1955

(Temporary Page C-9)

CONTRACT BONDS**Class B Contracts**

Manual page C-9 is hereby amended by deleting Sections 1 and 2 and substituting the following:

1. (a) For Performance or Performance Plus Payment Bond(s):

Basic Rate Table

Where stipulated time for completion is not over 24 months or
731 calendar days:

Contract Price	Rate Per M
First \$100,000.....	\$10.00
Next 2,400,000.....	6.50
Next 2,500,000.....	5.25
Next 2,500,000.....	5.00
Over 7,500,000.....	4.70
Minimum—\$10.00.	

Maximum—\$50.00 per M on the aggregate penalty of Performance and Payment Bonds.

Supplemental Rate Table

Where stipulated time for completion is over 24 months or 731 calendar days:

Compute basic premium at above rates and increase this computation by 1% per month for each month over 24 months (disregarding a fraction of a month).

* * * * *

Examples:

(1) Contract price, \$2,500,000; Stipulated time for completion 30 $\frac{1}{2}$ months.

First \$ 100,000 @ \$10.00.....	\$ 1,000.00
Next 2,400,000 @ 6.50.....	15,600.00
<hr/>	<hr/>
\$2,500,000	\$16,600.00
Add 6% for term (30 months).....	996.00

Term Premium \$17,596.00

(2) Contract Price, \$10,000,000; Stipulated time for completion 4 years (48 months).

First \$ 100,000 @ \$10.00	\$ 1,000.00
Next 2,400,000 @ 6.50	15,600.00
Next 2,500,000 @ 5.25	13,125.00
Next 2,500,000 @ 5.00	12,500.00
Next 2,500,000 @ 4.70	11,750.00

Add 24% for term (48 months)..... 12,954.00

Term Premium \$66,929.00

(b) For Payment Bonds only—apply rates p. C-30.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant, Anderson Construction Co., Inc., requests plaintiff, United States Fidelity and Guaranty Company, within twelve days after service of this Request, to make the following admissions for the purpose of this action only, and subject to the pertinent objections to admissibility which may be interposed at the trial.

That each of the following statements is true:

1. That the representative of plaintiff who conducted the negotiations with defendant resulting in the signing by defendant of Exhibit A attached to plaintiff's complaint was Jack Beeson.
2. That at the time of the delivery by defendant of said Exhibit A to Jack Beeson, the amount of the premiums was an unfilled blank.
3. That at the said time, plaintiff had been considering a reduction of its bond premium rates for bonds such as Exhibits B and C, attached to the complaint.
4. That at the said time, plaintiff had determined to reduce such rates.
5. That at the said time, the rates at which such bonds would have been written by certain qualified competing companies (non-Board companies) were substantially lower than plaintiff's rates.
6. That the reductions which plaintiff then contemplated were calculated to make plaintiff's rates

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more nearly competitive with the rates charged by said non-Board companies.

7. That the said Jack Beeson was advised of the said contemplated reduction in plaintiff's rates.

8. That the contemplated reductions were actually made.

9. That schedules setting forth the same were filed with the Insurance Commissioner of the State of Washington before July 20, 1955.

10. That the reduction in rates as applied to the premiums on Exhibits B and C attached to plaintiff's complaint amounted to \$12,176.93.

11. That this reduction was in excess of 25% of the premium now claimed by plaintiff.

12. That there was no substantial reduction in the cost of plaintiff's operations between June 17, 1955 and July 20, 1955.

13. That the rate claimed by plaintiff to have been in force in June, 1955, was unreasonable and excessive by at least 25%.

14. That plaintiff's rates for executing Exhibits B and C as surety were based upon an allowable period up to 24 months for the completion of the contract of which performance was guaranteed.

15. That for more than 22 of those 24 months, the reduced rates which defendant claims should apply were in effect.

16. That in the State of Washington where the rates charged by insurance companies have been reduced during the term of existing policies such as fire insurance, it has been customary for the

companies to refund a pro-rated share of the premium in accordance with such reduction.

17. That Jack Beeson agreed to fill in the blanks on Exhibit A with a total premium calculated at the new rates.

18. That the correct amount of the premium on said Exhibits B and C, if calculated at the new rates, would be \$35,576.79.

19. That of the said sum of \$35,576.79, defendant and its co-venturers caused to be paid to plaintiff before the institution of this action, the sum of \$23,876.86, and tendered to plaintiff an additional sum of \$11,699.93 and kept the said tender good by deposit of said amount with the Clerk of this Court.

WRIGHT, INNIS, SIMON & TODD,
/s/ ARTHUR E. SIMON,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR
ADMISSIONS

State of Washington
County of King—ss.

Martin Anderson, President of Anderson Construction Co., Inc., defendant above named, for and on behalf of the said defendant makes the following admissions and denials in response to the Re-

quest for Admissions served upon counsel for said defendant on September 21, 1956 on behalf of United States Fidelity and Guaranty Company, plaintiff above named.

Request No. 1—Defendant cannot truthfully admit or deny statement No. 1, for the reason that until the service of plaintiff's request herein affiant had never seen a copy of Exhibit No. 1 therein referred to, and has never had any information as to the filing thereof with the Insurance Commissioner of the State of Washington.

Request No. 2—For the same reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny the truth of the matters and things referred to in Request No. 2.

Request No. 3—For the reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny statement No. 3.

Request No. 4—Defendant admits that a calculation of the bond premium for a contract in the amount referred to in Exhibits B and C attached to plaintiff's complaint, at the rates set forth in Exhibit No. 1 attached to plaintiff's Request for Admissions would amount to approximately \$47,-753.72.

Request No. 5 — Defendant admits that the amount of premium therein referred to was calculated by applying rates like those referred to in Exhibit 2 attached to plaintiff's Request for Admissions.

Request No. 6—Defendant cannot truthfully ad-

mit or deny statement No. 6, for the reason that Exhibit A was incomplete at the time the same was delivered by defendant to J. C. Beeson, plaintiff's agent, representative and attorney in fact, in that the amount of the premium was left blank, and affiant does not know when or by whom the said blanks were filled and affiant was never furnished with a completed copy of the said Exhibit A.

Request No. 7—In response to Request No. 7, defendant admits that the bonds referred to were executed by defendant as principal and by plaintiff as surety before the 17th day of June, 1955, but defendant cannot truthfully admit or deny whether all blanks in the said bonds had been filled prior to said date, or whether the same were in fact ever filled, for the reason, among other things, that no completed copy of the said bonds was ever made available to defendant or its joint-venturers.

Request No. 8 — Defendant admits the matter stated therein.

Request No. 9 — Defendant admits the matter stated therein.

Request No. 10—Defendant believes that the matters stated in Request No. 10 are correct, because defendant's joint-venturers received a telegram to proceed with performance on June 20, 1955.

Request No. 11—Defendant admits the matters stated therein.

Request No. 12—Defendant denies the matters stated therein and states that relying upon the promised reduction in rates the bid ultimately submitted by defendant and its joint-venturers was re-

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duced to pass the benefit of such reduction to the Government.

Request No. 13—Defendant denies the matter set forth in this request, for the reasons heretofore set forth in the immediately foregoing answer.

/s/ MARTIN ANDERSON,

Subscribed and sworn to before me, this 25th day of September, 1956.

[Seal] /s/ C. M. DWYER,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR ORDER RELATIVE TO DEFENDANT'S RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiff moves in the alternative for order of court either striking the responses of defendant to certain requests of plaintiff for admissions under FRCP Rule 36 or requiring direct responses thereto making definite admissions or denials, such requests of plaintiff and such responses of defendant being as follows:

Plaintiff's request No. 1: That the document (of which copy marked "Exhibit 1" is attached hereto) being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washing-

ton for effect after the 30th of April, 1951, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C") is genuine.

Defendant's response No. 1: Defendant cannot truthfully admit or deny statement No. 1, for the reason that until the service of plaintiff's request herein affiant had never seen a copy of Exhibit No. 1 therein referred to, and has never had any information as to the filing thereof with the Insurance Commissioner of the State of Washington.

This response is evasive and non-committal. The information upon which to base a definite admission or denial is specifically available to the defendant as a matter of public record in the office of the Insurance Commissioner of the State of Washington.

Plaintiff's request No. 2: That the document (of which copy marked "Exhibit 2" is attached hereto) being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C"), is genuine.

Defendant's response No. 2: For the same reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny the truth of the matters and things referred to in Request No. 2.

This response is evasive and non-committal. The information upon which to base a definite admission or denial is specifically available to the defendant

as a matter of public record in the office of the Insurance Commissioner of the State of Washington.

Plaintiff's request No. 3: That the plaintiff's said premium rates as specified by "Exhibit 1" continued to be effective until superseded by the plaintiff's said premium rates as specified by "Exhibit 2".

Defendant's response No. 3: For the reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny statement No. 3.

This response is evasive and non-committal. The information upon which to base a definite admission or denial is specifically available to the defendant as a matter of public record in the office of the Insurance Commissioner of the State of Washington.

Plaintiff's request No. 7: That said bonds (Exhibit "B" and Exhibit "C") were fully executed both by the defendant, as principal, and by the plaintiff, as surety, before the 17th of June, 1955.

Defendant's response No. 7: In response to Request No. 7, defendant admits that the bonds referred to were executed by defendant as principal and by plaintiff as surety before the 17th day of June, 1955, but defendant cannot truthfully admit or deny whether all blanks in the said bonds had been filled prior to said date, or whether the same were in fact ever filled, for the reason, among other things, that no completed copy of the said bonds

was ever made available to defendant or its joint-venturers.

This response is evasive and non-committal. The recital of fact in plaintiff's request for admission relates not to copies but to originals of bonds (Exhibit "B" and Exhibit "C") which defendant possessed and which defendant executed according to its own admission. The information upon which to base definite admission or denial was available to defendant when it possessed and executed said bonds and is available to defendant by enquiring of the obligee on the bonds, the United States of America.

Dated this 2nd day of October 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 3, 1956.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

The Plaintiff, through Lane Summers, one of its attorneys of record, makes Response to Request for Admission served in behalf of the Defendant on the 26th of September, 1956, as follows:

Response to Request No. 14:

Yes, as expressly provided by written agreement signed by the Defendant (Exhibit "A").

Response to Request No. 19:

Yes.

Dated this 8th day of October, 1956.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
Plaintiff,
/s/ By LANE SUMMERS,
One of Its Attorneys.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 8, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S REQUESTS FOR ADMISSIONS

Invoking FRCP Rule 36 (a), the plaintiff hereby makes separate objection to each request made by the defendant for admission (except only Request No. 14 and Request No. 19), the objection being upon the ground that each such request is irrelevant.

The plaintiff hereby makes further separate objection to Request No. 5 upon the grounds that the same is vague and indefinite, and that the plaintiff should not be required to conduct independent enquiries among competing surety companies for information probably more readily available to the defendant than to the plaintiff.

The plaintiff hereby makes further separate objection to Request No. 11 upon the ground that the

same is frivolous calling for a mere percentage calculation of figures already known to the defendant.

The plaintiff hereby makes further separate objection to Request No. 13 upon the grounds that the same is frivolous and argumentative, and that the plaintiff's premium rate in force in June 1955 could not be "unreasonable and excessive" since the same was the legal effective rate as filed and approved by the Insurance Commissioner—therefore, the only rate that the plaintiff could lawfully charge and the defendant could lawfully pay.

The plaintiff hereby makes further separate objection to Request No. 15 upon the ground that the same is frivolous calling for a simple mathematical calculation.

Dated this 8th day of October, 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 8, 1956.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S OBJECTIONS TO
DEFENDANT'S REQUEST FOR ADMIS-
SIONS

This matter having come on duly and regularly for hearing on October 15, 1956, before the Honorable John C. Bowen, one of the Judges of this

Court, upon plaintiff's objections to defendant's Request for Admissions herein; the plaintiff being represented by Richard W. Buchanan, of Summers, Bucey & Howard, and the defendant being represented by Arthur E. Simon, of Wright, Innis, Simon & Todd; and the Court having heard the argument of counsel and being in all things advised, it is by the Court

Ordered:

1. That plaintiff's objections to defendant's Request for Admissions be and the same are hereby overruled, save and except the objections of the plaintiff to Request No. 5 and Request No. 11. As to the said numbered Requests the objection of plaintiff is sustained.
2. That the time within which plaintiff may respond to the defendant's Request for Admissions to which objection has not been sustained is hereby extended to ten days from the date hereof.
3. That by this ruling the Court has not indicated any final determination concerning the validity of the agreement referred to in the Affirmative Defense set forth in the Answer of the defendant herein, and the right is preserved to the parties to present the said issue in any proper manner hereafter.

Done in Open Court this 16th day of October, 1956.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ PRISCILLA A. TOWNSEND,
Of Counsel for Defendant.

No objection as to form, and notice of presentation waived.

/s/ LANE SUMMERS,
Of Counsel for Plaintiff.

[Endorsed]: Filed Oct. 16, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSES TO DEFENDANT'S REQUESTS FOR ADMISSIONS

State of Washington,

County of King—ss.

Jack Beeson, in behalf of the United States Fidelity and Guaranty Company, as plaintiff, makes responses to the Defendant's Requests for Admissions, as follows:

Request No. 1: Yes.

Request No. 2: No. The amount of the premium in the sum of \$47,753.72 was filled in the blank on the original of Exhibit "A" signed by the defendant.

Request No. 17: No.

/s/ J. C. BEESON.

Subscribed and sworn to before me this 17th day of October, 1956.

[Seal] /s/ LANE SUMMERS,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 24, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSES TO DEFENDANT'S REQUESTS FOR ADMISSIONS

State of Maryland,
City of Baltimore—ss.

J. Harry Cross, being Vice-President and General Counsel of the United States Fidelity and Guaranty Company, in its behalf as plaintiff, makes responses to the Defendant's Requests for Admissions, as follows:

Request No. 3: No. In explanation, a reduction in the rates for bonds in the classification of Exhibit "B" and Exhibit "C" was being given consideration by The Surety Association of America, in which consideration the plaintiff did not participate; and the action of such association was not announced to the plaintiff until the 2nd of July 1955.

Request No. 4: No.

Request No. 5: No response required under court order.

Request No. 6: There was no such contemplation or calculation by the plaintiff since the advisability of any change in rates was being considered by The Surety Association of America.

Request No. 7: No, for the same reason heretofore given in response to Request No. 6.

Request No. 8: No. However, reduction in rates was actually made as contemplated by The Surety Association of America but not by the plaintiff.

Request No. 9: The schedule setting forth the reduction in rates for a number of surety companies, including the plaintiff, was filed by The Surety Association of America with the Insurance Commissioner on the 5th of July 1955, the same becoming effective on the 20th of July 1955.

Request No. 10: No, reduction did not apply to premium on Exhibit "B" and Exhibit "C".

Request No. 11: No response required under Court Order.

Request No. 12: The plaintiff cannot truthfully admit or deny statement in Request No. 12 for the reason that it has no data or statistics upon which it can determine the cost of its operations as between the 17th of June 1955 and the 20th of July 1955.

Request No. 13: No. The plaintiff's premium rate as effective in June 1955 was approved by the Insurance Commissioner of the State of Washington.

Request No. 14: Yes, as provided by written agreement signed by the defendant (Exhibit "A").

Request No. 15: The reduced rates became effective on the 20th of July 1955.

Request No. 16: No, as to policies not subject to cancellation like surety bonds; yes, only as to policies subject to cancellation unlike surety bonds.

Request No. 18: Yes.

Request No. 19: No. That, after being billed by the plaintiff for its premium in the sum of \$47,753.72, by invoices dated July 1, 1955, August 1,

1955, and September 1, 1955, the defendant, without protesting that amount, made partial payments thereon, each being one-quarter thereof, to wit: The sum of \$11,938.47 on or about September 19, 1955, and the sum of \$11,938.47 on or about October 21, 1955; that such payments left unpaid the sum of \$23,876.86. That thereafter, before the institution of this action, the defendant tendered to the plaintiff the sum of \$11,699.93, which amount was subsequently deposited with the Clerk of this Court.

/s/ J. HARRY CROSS.

Subscribed and sworn to before me this 22nd day of October, 1956.

[Seal] ELEANORE D. SMITH,
Notary Public in and for the State of Maryland,
acting at Baltimore City.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 24, 1956.

[Title of District Court and Cause.]

REQUEST FOR PRE-TRIAL

To: Anderson Construction Co., Inc., defendant,
and Wright, Innis, Simon & Todd, its attorneys:

Please take notice that under Rule 16 of the Federal Rules of Civil Procedure and Rule 37(G) of the Local Rules of the United States District Court for the Western District of Washington, plaintiff

by its attorneys does request a pre-trial conference to consider:

- (1) The simplification of the issues
- (2) The necessity or desirability of amendments to the pleadings
- (3) The possibility of attaining admissions of fact and of documents which will avoid unnecessary proof
- (4) Such other matters as may aid in the disposition of the action.

Dated this 13th day of February, 1957.

SUMMERS, BUCEY & HOWARD,

/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 14, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

As a result of pre-trial conference heretofore conducted under and by direction of the Court herein, plaintiff was represented by its attorneys, Summers, Bucey & Howard, (Theodore A. LeGros of counsel); defendant was represented by its attorneys, Wright, Innis, Simon & Todd, (Arthur E. Simon of counsel); the parties with the approval of the Court approved of the following:

Admitted Facts

I.

The plaintiff United States Fidelity and Guaranty Company at all times material was and now is a corporation created and continued as such by and under the laws of the State of Maryland, of which it is a citizen and resident.

II.

The defendant Anderson Construction Co., Inc. at all times material was and now is a corporation created and continued as such by and under the laws of the State of Washington, of which it is a citizen and resident with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and duly authorized to engage in business as a surety within the State of Washington to which has heretofore been paid all prescribed fees.

IV.

This is a civil action in which the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

V.

That defendant signed and delivered to the plaintiff the latter's printed form of application applying for execution by plaintiff as surety of certain bonds to the United States of America in connection with a certain construction contract known as "DA 95-507-ENG-826 Elmendorf & Ladd A F B".

VI.

In connection with said signed printed application, the plaintiff executed on behalf of the defendant in favor of the United States of America two bonds, viz: a performance bond (Government Standard Form 25) in the sum of \$3,085,178.50 and a payment bond (Government Standard Form 25A) in the sum of \$2,500,000.00, and that on the back of one of said bonds appears a recital that the premium for said bonds was \$47,753.72 and that said bonds together with similar bonds executed by other members of the joint venture of which defendant was a member were delivered by and/or for the defendant and the other members of the joint venture by Islands Construction Co. as manager of said joint venture consisting of defendant corporation, Islands Construction Co. and Montin-Benson Corporation, and were received by and/or for the obligee, United States of America, on or before the 17th of June, 1955.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

That statements of account in the amount of \$47,753.72 were submitted to Islands Construction Co. as manager of the joint venture on account of the premium charged under dates of July 1, 1955, August 1, 1955, September 1, 1955, October 1, 1955, November 1, 1955, and December 1, 1955. That the

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joint venture without protest paid on said account under date of September 19, 1955, the sum of \$11,-938.43 and a like sum was similarly paid on account under date of October 21, 1955 which payments were properly credited.

IX.

That notification to defendant and others constituting the joint venture to proceed with performance under their construction contract identified as "DA 95-507-ENG-826 Elmendorf & Ladd A F B" was issued by or for the United States of America on the 17th of June, 1955.

X.

That the document (of which copy marked Exhibit a is attached hereto), being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the date of April 15, 1951, with respect to the bonds within the classification of the bonds involved in the above entitled action is genuine and that the amount of premium if calculated by using said rate for said bonds is \$47,753.72.

XI.

That the document (of which copy marked Exhibit b is attached hereto), being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington on the 5th of July, 1955, for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action is genuine and that the amount of premium if calculated

by applying the rates as specified in Exhibit b to said bonds is in the sum of \$35,576.79.

XII.

That the defendant on or about January 5, 1956, tendered to the defendant two checks, one being for \$2,805.73 and one being for \$8,894.20, amounting to \$11,699.93, which said tender was rejected by plaintiff and said checks were returned to defendant. That defendant has kept good its tender by depositing that amount with the clerk of the above entitled court on the 12th of July, 1956.

Plaintiff's Contentions

I.

That the written agreement dated June 3, 1955, was in all respects complete when signed and delivered by defendant and contains the joint and several promise of defendant and others to pay forthwith the premium for said bonds in the specified sum of \$47,753.72.

II.

The plaintiff, in engaging in its said business as a surety, in accepting said written agreement from the defendant and in executing said bonds at all times material was and is subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79) as amended, in consequence of provisions contained in §.01.04 and §.11.08 (4) thereof.

III.

Pursuant to the requirements of such Insurance

Code (§.19.04 and §.19.05) the plaintiff caused to be filed through a licensed rating organization in the office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on said bonds, which same having been accepted and approved by said Insurance Commissioner (§.19.06) became effective and binding as of the 30th day of April, 1951, and subsequently continued effective and binding until after the 20th day of July, 1955.

IV.

Said rates were applicable to the premium on said bonds and were effective and binding as to both the plaintiff and the defendant when the defendant became obligated upon said written agreement dated June 3, 1955 and when the plaintiff became obligated as surety upon said two bonds dated May 31, 1955, executed in favor of the United States of America, and also when the United States of America, after receiving and accepting the defendant's construction contract known as "DA-95-507-ENG-826 Elmendorf & Ladd A F B" with said bonds, authorized and directed the defendant to proceed with work thereunder on the 17th of June, 1955.

V.

The premium for said bonds in said sum of \$47,753.72, which the defendant promised to pay according to said written agreement, was rightly computed upon and correctly calculated at said premium rates then so effective and binding.

VI.

Said Insurance Code at all times material did and does contain mandates and prohibitions as follows:

“1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes.” (Section .19.04.)

“3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.” (Section .19.04.)

“1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.” (Section .19.05.)

“1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.” (Section .19.28.)

“Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance

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contract, or any commission thereon or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy." (Section .30.14.)

"Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate or premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor.
* * *" (Section .30.17.)

VII.

The premium for said bonds in said sum of \$47,753.72 was and is the only amount of premium legally chargeable by the plaintiff and legally payable by the defendant.

VIII.

That payments upon said premium following receipt by defendant and the other members of the joint venture of statements of account have been made aggregating \$23,876.86; that the balance of said premium remaining unpaid is in the sum of \$23,876.86 and that despite demand having been heretofore made for payment, the defendant and the other members of the joint venture have failed and refused to make payment of said unpaid balance for which it is legally obligated.

IX.

That statements of account having been submitted to defendant monthly commencing on or about July 1, 1955 and payments having been made thereon without protest, said account has become an account stated.

X.

That United States Fidelity and Guaranty Company neither directly by itself nor indirectly by any authorized agent agreed to take less than the legal rate of premium of \$47,753.72 for the said bonds.

Defendant's Contentions

I.

That the printed form of application hereinabove referred to in paragraph V of Admitted Facts was not complete when signed by Martin Anderson on behalf of the defendant and that certain typewritten portions thereof were filled in subsequent to the signing and delivery thereof to the plaintiff. That the amount of premium was in blank at the time of the signing of the said form of application by Martin Anderson and that the figures "47,753.72" which now appear in the said blank were inserted subsequent to such signing and delivery by a person or persons unknown to the defendant.

II.

That at or about the time said defendant signed the said form of application, J. C. Beeson, the agent who executed the said bonds on behalf of the plaintiff, represented to the defendant that the plaintiff

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was about to reduce its premium rates to make the same competitive with non-board companies (whose rates were approximately 25% lower) and asserted that if the defendant would sign the application for execution of the said bonds by the plaintiff, the defendant would be given the benefit of such reduced rates.

III.

That having authorized the said J. C. Beeson to solicit the said application and having authorized the said J. C. Beeson to sign the said bonds as Attorney in Fact for the said plaintiff and to deliver the same to the said defendant and having received and retained payments of the premium on the said bonds from McCollister and Company and/or the said J. C. Beeson, said plaintiff is estopped to deny the authority of the said J. C. Beeson to make the aforesaid oral contract on its behalf with the defendant.

IV.

That the oral contract referred to in the next preceding paragraph was and is a binding contract between the plaintiff and the defendant under the laws of the State of Washington and that the same was not and is not rendered void by any provisions of the Insurance Code of the State of Washington.

V.

That until this time the plaintiff has not by any appropriate pleading stated a cause of action for an account stated. That no statements of account were rendered by plaintiff to this defendant, other

than the statements sent by McCollister and Company to Islands Construction Co. as hereinabove set forth in paragraph VIII of the Admitted Facts; that the said statements were regarded by both McCollister and Company and the managers of the joint venture as pro forma only. That in a letter to Islands Construction Co. dated September 14, 1955 McCollister and Company stated that the amount due for the said bonds was \$35,815.29 and that the said amount was payable in three equal installments. That the two payments referred to in said paragraph VIII were made pursuant to the said letter by the joint venture.

VI.

That defendant sometime in October, 1955 for the first time became aware that the rate at which the pro forma statements for premiums due were being billed to the joint venture was an improper rate and promptly thereupon made inquiry and protest.

VII.

That the correct total premium due plaintiff for the execution of the said bonds was and is the sum of \$35,576.79; that plaintiff acknowledges receipt on account of the premium payment by or for the account of defendant of a total of \$23,876.86. That the balance of \$11,699.93 was duly tendered to agents of the plaintiff prior to the institution of this suit and that said tender was kept good at all times and the said amount is now on deposit with the clerk of this court pursuant thereto.

VIII.

That defendant has caused to be paid or tendered to plaintiff all sums due from said defendant to plaintiff herein and said defendant is entitled to a judgment of dismissal with prejudice and with its costs to be taxed.

Issues of Fact

The following are the issues of fact which will be determined by the jury herein.

I.

By signing the said printed application, did defendant become obligated to pay a premium of \$47,753.72.

II.

Did the printed application when signed by the defendant contain the figures \$47,753.72 as the amount of the premium.

III.

Did J. C. Beeson agree to give the defendant the benefit of the reduction in rates then contemplated by plaintiff.

IV.

Is the unpaid balance on the obligation to pay premium in the sum of \$23,876.86.

V.

Has plaintiff through its agents contracted to accept any lesser sum.

VI.

Is defendant obligated to the plaintiff on an ac-

count stated in the sum of \$47,753.72 less credit for payments made of \$23,876.86.

Issue of Law

The following issue of law is to be determined by the court:

I.

If there existed a contract to accept a premium in an amount less than \$47,753.72, is such contract valid under the laws of this state.

Exhibits

The exhibits of all parties below listed were produced and marked and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. All parties agree that exhibits listed below may be admitted subject only to objections of materiality or relevancy.

Plaintiff's Exhibits

Exhibit a. Premium rate schedule filed for effect after April 30, 1951.

Exhibit b. Premium rate schedule filed for effect after July 20, 1955.

Exhibit c. Photostatic copy of performance bond (Government Standard 25) of each of the joint ventures.

Exhibit d. Photostatic copy of payment bond (Government Standard 25A) of each of the joint ventures.

Exhibit e. Statements of account and cancelled checks.

Defendant's Exhibits

Exhibit f. Letter dated September 14, 1955 from McCollister Co. to Islands Construction Co.

The foregoing pre-trial order has been approved by the parties herein as evidenced by the signatures of their counsel, and this order is hereby entered as a result of which the pleadings are accordingly amended.

Done in open Court this 9th day of May, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved by:

/s/ DOUGLAS SHAW PALMER,
Of Attorneys for Defendant.

Prepared, presented and approved by:

/s/ THEODORE A. LeGROS,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

Comes now the plaintiff and respectfully requests the Court to instruct the jury as follows:

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Instruction No. —

It is the duty of the court to instruct you as to

the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole, and not pick out any particular instruction and place undue emphasis on such instruction.

While the court may have made some remarks or comment during the trial of this case, it has not done so with the idea of influencing your verdict.

You will disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the court, and any evidence which after the admission was stricken by the court.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

Instruction No. —

The party alleging in the pretrial order any material fact or contention has the burden of proof to establish such fact or contention by a fair pre-

ponderance of all the evidence. It is not essential that it be established by evidence introduced by the party having such burden of proof, but it may be established in whole or in part by evidence introduced by the opposite party.

Instruction No. —

By the term "burden of proof" is meant the obligation to prove or establish a fact by a fair preponderance of the evidence.

By the term "preponderance of the evidence" is meant that evidence on a particular matter which, when fairly, fully, and impartially considered by you, has greater weight with you, produces a stronger impression, and is more convincing to you as to its truth than that to which it is opposed; and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who may have testified for one party or the other regarding such matter.

Instruction No. —

You shall draw no inference from the asking of a question to which an objection has been sustained and shall disregard entirely any evidence that has been stricken by the court. Likewise, you shall wholly disregard all remarks or argument made by attorneys for either side which are not supported and justified by evidence admitted at the trial by the court.

Instruction No. —

You are the sole and exclusive judges of the facts

and of the degree of credit to be given to the testimony of the different witnesses who have testified before you. In weighing their testimony it will be your duty to consider their demeanor upon the witness stand, their manner of testifying, their apparent candor and fairness or lack of it, and interest or lack of interest in the result of the trial, the opportunities they have had for ascertaining and knowing the facts with reference to which they have testified, and from all the facts and circumstances it is your duty to give what you consider the proper weight to the testimony of each and every witness who has testified before you.

If you should be satisfied that any witness has knowingly testified falsely to any material matter in this case, you have the right to reject the whole of the testimony of such witness, unless corroborated by other credible evidence or by facts and circumstances proven.

Instruction No. —

It is the duty of the jurors to deliberate and consult together with a view to reaching an agreement if they can without violence to their individual judgment upon the evidence and under the instructions of the court. Each juror must decide the case for himself, but should do so only after consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinion on the case when convinced that they are erroneous. If any of your number should conscientiously believe that after an entire consideration with the

other jurors of all the testimony in the case and the instructions of the court, that the verdict should be for a particular party to the action, then such juror should so vote; and if any of your number should likewise conscientiously believe, after such consideration, that the verdict should be for the other party to the action, then such juror should so vote; but no juror should vote for either party nor be influenced in so voting for the single reason that a majority of the jury should be in favor of such party. In other words, despite your duty to agree, if possible, no juror should surrender his honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict for or against either party solely because of the opinions of the other jurors.

Instruction No. —

You are instructed that a joint-venture is treated at law as a form of partnership and that each member of the joint-venture is bound by the acts of the other member or members done within the scope of the joint-venture.

Instruction No. —

If you find that the amount of \$47,753.72 was inserted in the application form signed by the defendant at the time the defendant signed said form, your verdict will be for the plaintiff in the amount prayed.

Instruction No. —

You are instructed that if you find from the fair preponderance of the evidence that statements of

accounts were submitted to the defendant and/or the joint-venture, of which it was a member, on June 16, 1955 and on the first of each subsequent month and that defendant, or said joint venture failed to make any protest or objection to said statements of account for several months, and if you further find that payments on account were made on September 19, 1955 and October 21, 1955 then you are instructed that the account rendered has become a stated account and you must find for the plaintiff and against the defendant in the amount claimed by the plaintiff.

Instruction No. —

You are instructed that if you find from a fair preponderance of the evidence that United States Fidelity and Guaranty Company had filed a schedule of premium rates with the Insurance Commissioner of the State of Washington and that the premium charged defendant and the joint-venture members of which defendant was a member, was calculated at the rate which was in force when the bonds became effective, and if you further find that no other rate was applicable, then you will find for the plaintiff in the amount prayed.

Instruction No. —

You are instructed that if you find that United States Fidelity and Guaranty Company had never given McCollister & Company or J. C. Beeson as agents the express authority to accept application for surety bonds at an agreed premium rate less

than that legally set by the Insurance Commissioner and if you find that no apparent authority was given for such an agreement, and you further find that such agreement was specifically prohibited by the terms of the Insurance Code of the State of Washington, then any such agreement, if one was made, was wholly without the agency authority of McCollister & Company or J. C. Beeson and would not be binding upon United States Fidelity and Guaranty Company and you will find for plaintiff in the amount prayed.

Instruction No. —

You are instructed that a principal is only responsible for the acts of his agent performed within the scope of its authority and that to hold the principal to such responsibility a third party in dealing with the agent must ascertain its authority and know that said agent is acting within its apparent scope.

Instruction No. —

You are instructed that every one is presumed to know the public law of his State with which he must comply.

Instruction No. —

You are instructed that, under the laws of the State of Washington, insurance is defined as follows:

“Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.”

This definition, therefore, includes the execution

of a bond or bonds such as were executed in this case.

Instruction No. —

You are instructed that the Insurance Code of the State of Washington is a public law of said State and provides:

Section .19.04 Filing Required:

“1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes.

* * * * *

“3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.” (Cf. R.C.W. 48.19.040)

Section .19.05 Filings by Bureau:

“1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.” (Cf R.C.W. 48.19.05)

Section .19.28 Deviations:

“1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom

except as provided in this section.” (Cf R. C. W. 48.19.280)

Section .19.43 Penalties:

“Any person violating any provision of this article shall be subject to a penalty of not more than fifty dollars (\$50) for each such violation, but if such violation is found to be willful a penalty of not more than five hundred dollars (\$500) for each such violation may be imposed. Such penalties may be in addition to any other penalty provided by law. (Cf. R.C.W. 48.19.430)

Section .30.14 Rebates:

“1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” (Cf. R.C.W. 48.30.140)

Section .30.16 License Revocation for Rebates:

“The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker, or solicitor guilty of violating any provision contained in sections .30.14 and .30.15.

No such insurer, general agent, agent, broker, or solicitor shall, following any such revocation, be eligible for a certificate of authority or license within one (1) year after such revocation." (Cf. R.C.W. 48.30.150)

Section .30.17 Receiving Rebates:

"1. No insured person shall receive or accept directly or indirectly, any rebate or premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. * * * " (CF. R.C.W. 48.30.170)

Acknowledgment of Service Attached.

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant Anderson Construction Co. requests the court to give to the jury the following instruction:

Instruction No. —

The plaintiff United States Fidelity and Guaranty Company is suing the defendant Anderson Construction Co. to recover the balance alleged to be due the plaintiff on the premium for furnishing a performance bond and a payment bond to the

United States Government for the defendant. The plaintiff claims that the unpaid balance of this premium is \$23,876.86. The defendant claims that the unpaid balance of this premium is \$11,699.93, which it has tendered to plaintiff and paid into court.

The defendant Anderson Construction Co. is in the construction business. In 1955 it formed a joint venture with two other companies, Islands Construction Co. and Montin-Benson Co., to bid upon a contract with the United States for certain construction work upon an air force base in Alaska. This bid was accepted by the United States. In order to do the work, however, the members of the joint venture had to furnish the United States with a performance bond, guaranteeing payment to the government if they failed to perform their contract, and also a payment bond, guaranteeing their payment of all claims for material and labor in connection with the project.

The plaintiff is a commercial insurance company in the business of furnishing such bonds for a fee. In about May 1955, when the joint venture was bidding on the government contract, the defendant applied to the plaintiff for the execution of a performance bond and a payment bond required by the government. This application was handled for the plaintiff by McCollister and Company, insurance brokers, and by J. C. Beeson, vice president of McCollister and Company. The McCollister Company furnished the defendant with plaintiff's printed

form of application for such bonds, and the defendant through its officers signed the application and delivered it to McCollister and Company for the plaintiff. Thereafter, in June 1955, the plaintiff executed the two bonds through J. C. Beeson, as its attorney-in-fact. The bonds were delivered to the United States about June 17, 1955. These bonds are still in effect. On the back of one of the bonds is a recital that the premium paid for both bonds was \$47,753.72. At the time the defendant applied for the bonds and at the time they were executed by the plaintiff, the plaintiff had on file with the Insurance Commissioner of the state of Washington its schedule of premium rates for such bonds. If calculated according to the rates then on file, the premium on these bonds would be \$47,753.72. On July 5, 1955 the plaintiff caused new reduced premium rates to be filed with the Insurance Commissioner of the state of Washington, which became effective on July 20, 1955. If calculated according to these new reduced rates, the premium for the bonds furnished by the plaintiff would be \$35,576.79.

Instruction No. —

The plaintiff contends that when the defendant signed and delivered its printed form of application to the plaintiff through J. C. Beeson, of McCollister and Company, the application was complete in all respects and set forth in the appropriate space on the form a premium of \$47,753.72 for the bonds. If you find this to be true, you should return a verdict for the plaintiff.

The defendant contends, on the other hand, that the printed form of application which it signed was not complete when delivered to the plaintiff through J. C. Beeson, but that the space in the printed form for the insertion of a premium was intentionally left blank; that Mr. Beeson represented to the defendant that the plaintiff was then in the process of reducing its premium rates for such bonds; that this reduction in rates would be made shortly; and that if the defendant would sign the application with the premium left blank, it would get the benefit of these reduced rates. If you find this to be true, you should return a verdict for the defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

**PLAINTIFF'S ADDITIONAL REQUESTED
INSTRUCTIONS**

Comes now the plaintiff and submitting the following additional instructions requests that they be given the jury in addition to those previously submitted.

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Instruction No. —

You are instructed to return a verdict in favor of the plaintiff and against the defendant in the amount prayed.

Instruction No. ——

You are instructed that plaintiff in engaging in its business as a surety and in executing said bonds, was and is subject to the Insurance Code of the State of Washington as then in force.

Instruction No. ——

You are instructed that pursuant to the requirements of such insurance code, plaintiff caused to be filed through a licensed rating organization in the Office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on the bonds in question and that on the basis of the rates in force at the time said bonds became effective, the only rate plaintiff was lawfully entitled to charge the defendant for the said bonds was the sum of \$47,753.72.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant Anderson Construction Co. requests the court to give to the jury the following instruction:

Instruction No. 3

The plaintiff contends that the defendant is liable for a total premium of \$47,753.72 on the basis of an account stated between the plaintiff and defendant.

An account stated is an agreement between parties who have had previous monetary transactions that all the items of account representing such transaction, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance. The rendering of an account by one party to another is not alone sufficient to make it an account stated. The crucial factor is whether the parties intended to agree upon the account rendered. On one hand, there must be evidence to show that the party sought to be charged has by his language or conduct admitted the correctness of the account. If a person receiving an account keeps it beyond a reasonable time, or makes payment upon it, without objecting to its accuracy, this may be evidence of his admission that the account is correct. On the other hand a person receiving an account does not admit its correctness, even though he keeps it without protest, where he has no knowledge or opportunity for knowledge of all the circumstances concerning the account, or where the account is at variance with a special contract between the parties.

Authority for Instruction:

Austin v. Union Lumber Co. 95 Wash. 608, 610-11 (1917);

1 C. J., Accounts and Accounting, Secs. 249, 251, 264, 276, 289.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 16, 1957.

[Title of District Court and Cause.]

DEFENDANT'S ADDITIONAL REQUEST

Defendant requests that the Court in charge of the jury herein give the attached instruction.

WRIGHT, INNIS, SIMON & TODD,
Attorneys for defendant.

Instruction No. —

The Insurance Code of the State of Washington contains the following provision:

"R.C.W. 48.19.020 Rate Standard. Premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory. * * *."

Acknowledgment of Service Attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

VERDICT FOR DEFENDANT

We, The Jury In The Above-Entitled Cause, Find for the defendant.

/s/ GORDON R. NEWELL,
Foreman.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR AN ORDER GRANTING PLAINTIFF A NEW TRIAL

Comes Now the plaintiff and respectfully moves the court for an order in the above entitled cause setting aside the verdict of the jury and the judgment entered thereon and for an order in accordance with plaintiff's request for a directed verdict. This motion is based upon the following grounds:

- (1) That all of the evidence before the jury established the existence in law and fact of an "account stated" upon which plaintiff is entitled to recover.
- (2) That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc. was ever given any express authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defendant would pay less than the legal premium for the bonds involved.
- (3) That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc. was ever given any apparent authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defend-

ant would pay less than the legal premium for the bonds involved.

(4) That all of the evidence before the jury established that United States Fidelity and Guaranty Company gave no authority express or apparent to J. C. Beeson or McCollister & Company, Inc. to enter into any contract giving defendant any premium rate other than that established by law.

In the alternative plaintiff moves for a new trial upon the following grounds:

(1) Error in law in that the court did overrule plaintiff's exception made to the affirmative defense of the defendant.

(2) Error in instructing the jury in that the court (a) failed to give plaintiff's requested instructions as to a directed verdict, and (b) instructed the jury that such special agreement as was alleged would not be void, and (c) instructed the jury that if such special agreement was made the verdict should be for the defendant.

SUMMERS, BUCEY & HOWARD,

/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 25, 1957.

United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 4093

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Plaintiff,

VS.

ANDERSON CONSTRUCTION CO., INC., a
corporation, Defendant.

Defendant.

**ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
AND FOR A NEW TRIAL**

Be it Remembered that the above cause came on for hearing before the Honorable John C. Bowen, sitting with a jury, on May 14, 1957, and the said trial was continued from day to day until May 17, 1957, when the verdict of the jury was duly and regularly returned in favor of the defendant, Anderson Construction Co., Inc., a corporation, and judgment upon the said verdict was forthwith entered by the Clerk pursuant to Rule 58 of the Rules of Civil Procedure for the District Courts of the United States; and thereafter plaintiff, United States Fidelity and Guaranty Company, a corporation, on May 25, 1957, duly and regularly served and filed herein its Motion for Judgment Notwithstanding the Verdict, or in the alternative for an

Order Granting Plaintiff a New Trial, and the said motion came on duly and regularly for hearing on June 10, 1957 before Honorable John C. Bowen, one of the Judges of the above Court, plaintiff being represented by its attorneys, Summers, Bucey & Howard and Theodore A. LeGros, and the defendant being represented by its attorneys, Wright, Innis, Simon & Todd and Arthur E. Simon; and the Court having heard the argument of counsel and being in all things fully advised, and having announced the decision of the Court denying the said motion of the plaintiff for judgment notwithstanding the verdict, and also denying the alternative motion of the said plaintiff for a new trial; and the said plaintiff having requested the entry of a formal order in the premises, Now, Therefore, it is by the Court

Ordered, that the motion of United States Fidelity and Guaranty Company, a corporation, plaintiff above named, for judgment notwithstanding the verdict, or in the alternative for an order granting a new trial herein, be and the same is hereby in all respects denied.

Done in Open Court this 17th day of June, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ DOUGLAS SHAW PALMER,
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Defendant.

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Approved as to form and Notice of Presentation waived.

/s/ THEODORE A. LeGROS,
SUMMERS, BUCEY & HOWARD,
Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United States Fidelity and Guaranty Company, a corporation, plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 17th day of May, 1957.

SUMMERS, BUCEY & HOWARD,

/s/ By THEODORE A. LeGROS,
Attorneys for Appellant United States Fidelity and
Guaranty Company, a corporation.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents, that we, United States Fidelity & Guaranty Company, and Maryland Casualty Company, a corporation of the State of Maryland, authorized to become sole surety

on bonds in the State of Washington, as Surety, are held and firmly bound unto Anderson Construction Co., Inc., Defendant above named, as Obligee, in the penal sum of Two Hundred Fifty and No/100ths (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated This 16th day of July, 1957.

Whereas, on the 17th day of May, 1957, the above entitled Court rendered and entered a judgment or decree in the above entitled cause in favor of the above named Defendant.

And Whereas, said United States Fidelity & Guaranty Co., Plaintiff, feeling aggrieved by said judgment or decree and desiring to appeal from the same to the Circuit Court of Appeals of the United States of America and perfect said appeal by this bond;

Now, Therefore, The Condition of the Above Obligation Is Such; That if the said appellant will pay all costs and damages that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100ths (\$250.00) Dollars, then this obligation shall be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY &
GUARANTY CO.,

/s/ By THEODORE A. LeGROS,
Its Attorney
Principal.

[Seal] MARYLAND CASUALTY COMPANY,

/s/ By W. W. DIETZ,
Attorney-In-Fact.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

ORDER AS TO EXHIBITS

On ex parte motion of appellant, it is hereby ordered and directed that as a part of the record on appeal in the above entitled action, the clerk of the above entitled court shall transmit to the United States Court of Appeals for the Ninth Circuit the original of all exhibits as designated, either by the appellant or by the appellee.

Done in open court this 19th day of August, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved and presented by:

SUMMERS, BUCEY & HOWARD,
/s/ RICHARD W. BUCHANAN,
Attorneys for Appellant.

Approved as to form and notice of presentation waived:

WRIGHT, ENNIS, SIMON & TODD,
/s/ ARTHUR E. SIMON,
Attorneys for Appellee.

[Endorsed]: Filed Aug. 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP, I am transmitting herewith the following original documents in the file dealing with the above action, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Feb. 21, 1956, with exhibits A, B and C attached.
2. Summons with Marshal's Return, filed Feb. 23, 1956.
3. Answer, filed July 12, 1956.
4. Stipulation and Order Regarding Tender into Court, filed 7/12/56.
5. Plaintiff's Motion for Leave to Amend its Complaint, filed Aug. 17, 1956.
6. Note for Motion Calendar, filed Aug. 20, 1956.
7. Plaintiff's Reply, filed Sept. 21, 1956.
8. Plaintiff's Request for Admissions by Defendant, filed 9/21/56, with Exhibits 1 and 2 attached.
9. Demand for Jury Trial, filed Sept. 26, 1956.

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10. Request for Admissions, filed 9/26/56.
11. Response to Request for Admissions, filed 9/26/56.
12. Plaintiff's Motion for Order Relative to Defendant's Response to Request for Admissions, filed Oct. 3, 1956.
13. Note for Motion calendar, filed 10/3/56.
14. Plaintiff's Memorandum of Authorities in Support of Motion to Strike or Compel Direct Responses, filed 10/5/56.
15. Defendant's Reply Memo. in Opposition to Plaintiff's Motion to Strike or Compel Direct Responses, filed 10/5/56.
16. Response to Request for Admissions, filed 10/8/56.
17. Plaintiff's Objections to Defendant's Request for Admissions, filed 10/8/56.
18. Notice of Hearing, filed 10/8/56.
19. Plaintiff's Memorandum Brief on Objections to Defendant's Requests for Admissions, filed Oct. 11, 1956.
20. Defendant's Memorandum in Opposition to Plaintiff's Objections to Defendant's request for Admissions, filed Oct. 12, 1956.
21. Order on Plaintiff's Objections to Defendant's Request for Admissions, filed Oct. 16, 1956.
22. Plaintiff's Responses to Defendant's Requests for Admissions, filed 10/24/56.
23. Plaintiff's Responses to Defendant's Requests for Admissions, filed 10/24/56.
24. Deposition of William V. Montin, filed 2/4/57.

25. Plaintiff's Request for Pre-Trial hearing, filed 2/14/57.
26. Notice of Hearing upon Request for Pre-Trial conference, filed 2/14/57.
27. Praeclipe, plaintiff, for 10 subpoenas in blank, filed 5/6/57.
28. Pre-Trial Order, filed 5/9/57.
29. Deposition of Martin Anderson, filed 4/23/57.
30. Deposition of V. J. Oja, filed 5/10/57.
31. Deposition of L. E. Baldwin, filed 5/10/57.
32. Plaintiff's Requested Instructions, filed 5/14/57.
33. Defendant's Requested Instructions, filed 5/14/57.
34. Plaintiff's Trial Brief, filed 5/14/57.
35. Defendant's Memorandum of Authorities, filed 5/14/57.
36. Defendant's Memorandum of Authorities, filed 5/14/57.
37. Plaintiff's Additional Requested Instructions, filed 5/15/57.
38. Defendant's Requested Instructions, filed 5/16/57.
39. Defendant's Additional Request for Instruction, filed 5/17/57.
40. Verdict for Defendant, filed 5/17/57.
41. Marshal's returns on Subpoenas, Anderson, et al, filed 5/22/57.
42. Motion for Judgment NOV or for New Trial, filed 5/25/57.
43. Order Denying Motion for Judgment Not-

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withstanding the Verdict and for a new trial, filed June 17, 1957.

44. Notice of Appeal, filed July 16, 1957.

45. Cost Bond on Appeal, filed July 16, 1957 (\$250.00, USF & G Co.).

46. Appellant's Designation of Record on Appeal, filed Aug. 19, 1957.

47. Statement of Facts. (Court Reporter's Transcript of Proceedings), filed August 19, 1957.

48. Order transmitting exhibits as designated as part of record, on appeal, filed Aug. 19, 1957.

Plaintiff's Exhibits numbered 1 to 13 inclusive, and No. 15.

Defendant's Exhibits A-1 to A-4 inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit:

Filing Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 19th day of August, 1957.

[Seal] MILLARD P. THOMAS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4093

UNITED STATES FIDELITY & GUARANTY
CO., a corporation, Plaintiff,

vs.

ANDERSON CONSTRUCTION CO., INC., a cor-
poration, Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the above-entitled and numbered cause was heard before the Honorable John C. Bowen, one of the Judges of the above-entitled Court, and a jury, beginning Tuesday, May 14, 1957, at 10:25 o'clock a.m.

The plaintiff was represented by Mr. Theodore A. LeGros, of Messrs. Summers, Bucey & Howard, Attorneys at Law.

The defendant was represented by Mr. Arthur E. Simon and Mr. Douglas Palmer, of Messrs. Wright, Innis, Simon & Todd, Attorneys at Law.

Whereupon, the following proceedings were had and done, to-wit: [1]*

The Court: I ask if the parties and Counsel are ready to proceed with the trial of the case entitled

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

United States Fidelity & Guaranty Co., a corporation, versus Anderson Construction Company, a corporation, No. 4093.

Mr. LeGros: The plaintiff is ready, your Honor.

The Court: I ask the clerk to call a jury into the jury box to try that case.

(Thereupon, the empaneling of a jury was begun, and continued until 12:00 o'clock noon, at which time the following proceedings were had):

The Court: I would like to advise Mr. Swanson and Mr. Erlingsen that when we take the next recess, which will be during the noon hour, that you are excused and may go about your business as if you had not been asked to come here today, subject to the Court's later notification to you sometime in the future after today, I do not know when, to render further jury service.

All other jurors now in this courtroom except those two, and including particularly the jurors now [2] in the spectator seats other than Mr. Swanson and Mr. Erlingsen, and each and every juror now in the jury box, are excused during the noon hour until 2:30 o'clock this afternoon.

During that time the Court strictly admonishes you not to discuss this case among yourselves, do not discuss it with anyone else, avoid conversations with the parties and their Counsel and with the witnesses in the case, avoid all contacts with strangers and do not discuss this case with anyone. Do not permit anyone to discuss it with you.

That applies to you yourselves. Do not discuss

this case among yourselves. Just forget all about this case until and unless the Court later on makes some amending or different order.

And the jurors every time after coming to the jury box and unless the Court advises you otherwise will on the occasion of every recess when the jurors are absent from the jury box and/or the jury room will refrain from discussing this case and will refrain from permitting others to discuss it with you, and apply these admonitions to all of your conduct.

Be sure not to read anything in the newspapers about it and do not listen to any statements over the radio or television about it. Be certain to [3] have this in mind.

I ask the jurors now in the courtroom and those in the jury box to now retire for the noon hour until 2:30. Be back here promptly at that time. This does not include Mr. Swanson and Mr. Erlingsen. They are excused subject to later call.

Each and all of the jurors will have the opportunity first to leave the courtroom and use the elevators.

Each juror now in the jury box will return to the *respect* seat in the jury box which you now occupy when you return after lunch. Be sure that you return to the same juror's seat in the jury box which you now occupy.

And as to Mr. Rogers, further inquiries will be made of him after the resumption of the court session at 2:30. The Court has some other duties to perform in the meantime.

I ask all others in the courtroom other than the jurors to kindly wait until these jurors have the first opportunity of using the elevators to leave the courthouse.

The jurors will now retire.

(The prospective jurors left the courtroom.)

The Court: The Court will welcome the requested instructions from each side as soon as you may conveniently give them after the jury is sworn.

Counsel are excused and the court is now recessed until 2:30.

(Thereupon, at 12:05 o'clock p.m. a recess herein was had until 2:30 o'clock p.m.)

Tuesday, May 14, 1957. 2:30 O'Clock P.M.

(All parties present as before.)

The Court: May it be stipulated by and between Counsel that each one and all of the jurors who were in the jury box at the call of the last recess has returned to the seat occupied by each one of the jurors respectively and that each and all of such jurors then in the jury box are now present?

Mr. LeGros: It is so stipulated.

Mr. Simon: The defendant will so stipulate.

The Court: And that all parties on trial with their Counsel are either present or represented [5] by their Counsel?

Mr. LeGros: Yes, your Honor.

Mr. Simon: The defendant so stipulates.

The Court: I wish now to resume the interrogation and qualifying of the jurors, and I wish now to direct some inquiries to Mr. Rogers.

(Thereupon, the empaneling of the jury was continued.)

The Court: Confined to Mr. Rogers the defendant may now exercise its second peremptory challenge.

Mr. Simon: If the Court please, the defendant continues to be satisfied with the jury as now constituted.

The Court: And do you accept the jury as now constituted?

Mr. Simon: We do, your Honor.

The Court: The plaintiff may now exercise its third and last peremptory challenge.

Mr. LeGros: If the Court please, the plaintiff will now accept the jury as constituted.

The Court: I would like to ask, before the Court finally acts upon Counsel's last statements, if there is anyone among the jurors now in the jury box who is aware of any condition in your health or in the [6] health of some member of your household which gives you any particular concern at this time. If so, will you hold up your right hand?

(No response.)

The Court: Does any one of you take daily relief from or receive any care for diabetes?

(No response.)

The Court: Does anyone of you know of any heart affliction or any other organic trouble that might conceivably be worsened by your jury service including, among other things, the going up and down what I would call a short flight of stairs to the jury room?

(No response.)

The Court: Does any one of you know of any health reasons why you should not act as jurors?

(No response.)

The Court: Hearing none, I ask each and all of the jurors now in the jury box, all of whom have been accepted by Counsel on both sides as the jury to try this case, to now rise and be sworn as such jury.

(Thereupon, the jury was sworn by the clerk of court at 2:38 o'clock p.m.) [7]

The Court: What is the attitude of Counsel respecting whether the length of this trial is such as to call for the empaneling of alternate jurors, one or more?

Mr. LeGros: If the Court please, I cannot anticipate that this case will take longer than today and tomorrow to try.

The Court: What is the attitude of defendant's Counsel?

Mr. Simon: I have no reason to disagree with my friend in that respect.

The Court: And do you feel that there is any reasonable necessity for alternate jurors?

Mr. Simon: I should say not, your Honor.

The Court: The Court will not empanel alternate jurors, and all of the other jurors now present will not be needed longer in this case, and I wish to thank each and all of you, and I include all of those in the jury box, for their very unselfish response to the Court's call for jury service and the

assistance of jurors. You are now excused, all of the jurors present except those in the jury box.

The Court: I ask the jurors in the jury box today and on all future days when you attend this court as jurors, be sure to report your attendance at the [8] Clerk's office on the third floor.

We have reached the stage in the trial now where it is appropriate for Counsel on each side, if they wish to do so, to make what we call an opening statement.

This opening statement is not evidence and it must not be so regarded by the jury. It is a mere outline, an advance outline predictive statement where Counsel lets the jury and the Court know what Counsel at this stage honestly think the jury will receive as evidence during this trial. It is not evidence, it is not testimony by Counsel, it is not argument, and Counsel should not argue or make any comment on the probative effect of any part of the evidence. It is just what I have said, merely a brief outline of the evidence so that the jury can know better what to expect in the way of evidence, and so far as what it proves or what it does not prove or what it establishes or what it is good for, there is no need of any comment about that. We will hear that type of argument later on during the trial.

Neither Counsel is required to make such an opening statement but each will in proper order, giving the first opportunity to the plaintiff, have that opportunity now. [9]

It is possible that defendant might, if he chooses,

reserve that opportunity until some later proper stage in the trial.

While making that statement at this time each Counsel may take any position in the courtroom most agreeable to Counsel who is making the statement.

At this time we will hear plaintiff's opening statement.

(Thereupon, Mr. LeGros made an opening statement in behalf of plaintiff to the Court and jury.)

The Court: At this time or later on at some proper stage of the trial defendant's Counsel may make defendant's opening statement.

(Thereupon, Mr. Simon made an opening statement in behalf of defendant to the Court and jury.)

The Court: At this time the plaintiff may proceed with the plaintiff's case in chief.

Mr. LeGros: Call Mr. Anderson as an adverse witness.

The Court: Come forward, Mr. Anderson, and be sworn as an adverse witness. [10]

MARTIN ANDERSON

called as an adverse witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Will you state your name in full, please? A. Martin Anderson.

Q. Where do you reside, Mr. Anderson?

(Testimony of Martin Anderson.)

A. Seattle, Washington.

Q. And your street address, please?

A. Marion and Fourth Avenue.

Q. Do you live at the Rainier Club?

A. Right.

Q. How long have you been in the construction business, Mr. Anderson?

A. Approximately thirty years.

Q. During that time approximately how many fidelity bonds have you obtained from either U.S.F. & G. or others in the field?

A. Oh, I would be guessing somewhat. Probably fifty.

Q. Is that on the low side? A. Probably.

Q. On the occasion in 1955 when you became interested in bidding on the so-called Elmendorf and Ladd Air Force Base job, when was it that you first became aware that [11] that project was up for bids?

A. Sometime in April of 1955, I think.

Q. Did you or someone else from your organization first approach the others in this joint venture with the idea of jointly bidding on this job?

A. Yes.

Q. I'm trying to get at with whom did the idea of a joint venture originate.

A. I think it originated with Mr. Baldwin.

Q. With Mr. Baldwin?

The Court: Who is he, Mr. Anderson?

A. He's president of Islands Construction Company.

(Testimony of Martin Anderson.)

The Court: Did you say, and if not will you now say, what your corporate capacity with the defendant Anderson Construction Company is? What is your corporate relationship, your corporate position, the office in the corporation?

A. I'm president of the company.

Q. (By Mr. LeGros): How long has Anderson Construction Company been incorporated?

A. I think it was 1948.

Q. And who were your officers in 1955?

A. Myself, Willard Wright and Raymond Wright.

Q. Those are two members of the law firm with which Mr. [12] Simon is associated? A. Yes.

Q. And how about Miss Galbraith?

A. She was assistant secretary.

Q. She was assistant secretary? A. Yes.

Q. Now, Mr. Anderson, handing you what has been marked as Plaintiff's Exhibit—

The Clerk: Plaintiff's Exhibit 1.

(A bid bond application was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. LeGros): —1, handing you Plaintiff's Exhibit 1, I wish you would examine that document. Directing your attention to the third printed page, do you find your signature on that page? A. Yes.

Q. And is that your signature? A. Yes.

Q. And it's signed "Martin Anderson, President?" A. Yes.

(Testimony of Martin Anderson.)

Q. That's under "Anderson Construction Company, Inc.?" A. Yes.

Q. And did you sign that document?

A. Yes.

Q. And what is the date of that document, please? [13]

Mr. Simon: I object to that as calling for the contents of an instrument not admitted in evidence. I assume—unless he is inquiring as to the date on which it was signed by Mr. Anderson.

The Court: That objection is sustained. You may ask him the latter question if you wish.

Q. (By Mr. LeGros): When did you sign this application, please?

A. I do not remember the exact date, but it was signed sometimes prior to May 25, 1955.

The Court: Does that exhibit have a name by which it is usually called in your business? If so, state it.

A. You mean this?

The Court: Yes, that Plaintiff's Exhibit 1 for identification. What kind of a paper is it, is what I mean by my question.

A. Here it says, "Contract Application." We usually call—

The Court: Is that what you call it, or is that—I want to know what you call it. What kind of a name would you attribute to that paper?

A. We usually call it a bid bond application.

The Court: You may inquire. [14]

Q. (By Mr. LeGros): Now, do you recall my

(Testimony of Martin Anderson.)

asking you the same question at the time your oral deposition was taken on April the 23rd, 1957?

A. I do not recall that the question was the same.

Q. Specifically referring to your deposition on Page 13, Line 4, do you recall at that time, Mr. Anderson, that you were under oath? A. Yes.

Q. And I asked you this question:

"Q. Do you recall or do your records indicate the date upon which the application form was signed by you?

"A. The date it was signed?

"Q. Yes.

"A. No, I don't recall the date it was signed.

"Q. Can you tell us about when it was signed?

"A. Oh, I would say it would be the latter part of May or early June."

Now, is your testimony different on this occasion than it was on that?

Mr. Simon: I object to that as not proper, not a proper question.

The Court: The objection is overruled. [15]

A. If I understand it right, if it was signed prior to the 25th of May, it could still be in the latter part of May.

Q. (By Mr. LeGros): How about this: " * * * the latter part of May or early June?"

A. Well, I didn't have the dates too well memorized.

Q. You're not sure, in other words?

(Testimony of Martin Anderson.)

A. I am sure for this reason, if I may explain it—

The Court: You may do so, Mr. Anderson.

A. The job was bid on the 25th day of May, if my memory serves me right, and the bonding company are usually very zealous to have our name on that bid bond application prior to the time the job is bid. That's why I am sure it was signed prior to the 25th of May.

Q. (By Mr. LeGros): You mean you weren't sure on April the 23rd but you are sure now?

A. Because I've refreshed myself on the dates a little bit since then.

Q. Now, Mr. Anderson, do you recognize the signature of any of the other signatories to that bond? A. Yes, I do.

Q. And whose are they, please?

A. Mr. Oja and Mr. Montin.

The Court: How do you spell the name of Oja?

A. O-j-a. [16]

The Court: O- what?

A. O-j-a.

Mr. LeGros: I will offer Plaintiff's Exhibit 1 into evidence.

Mr. Simon: I should like to inquire briefly as to its present condition as compared with the time of his signature on the voir dire as a basis for whether it's admissible or not.

Mr. LeGros: If the Court please,—

Mr. Simon: It's our position that it has been

(Testimony of Martin Anderson.)

altered since its signing and it is not admissible until that alteration is explained.

Mr. LeGros: If the Court please, that is a matter of affirmative defense. It is a written document and it speaks for itself.

The Court: The request is denied. You may before the Court finally makes a ruling on the offer. I will sustain the ruling until I find out whether there is to be any cross examination or not. Even though it may not be exactly in line with usual procedure to do it, the Court has the thought that in this case it would be appropriate to do that. You may proceed. Is there anything else you wish to ask of this witness?

Mr. LeGros: No, your Honor. [17]

The Court: You may inquire.

Mr. LeGros: I am not through with my examination, your Honor.

The Court: Very well. I wish you to proceed with your examination then if you are not before the Court extends the right of cross examination of this witness who was called as an adverse witness.

Mr. LeGros: Your Honor is withholding the ruling on this offer?

The Court: I am withholding the ruling on this offer.

The Clerk: Plaintiff's Exhibits Nos. 2 and 3.

(A performance bond was marked Plaintiff's Exhibit No. 2 for identification.)

(A payment bond was marked Plaintiff's Exhibit No. 3 for identification.)

(Testimony of Martin Anderson.)

Mr. LeGros: May I ask, Mr. Clerk, which one is 2 and which one is 3?

The Clerk: No. 2 is the performance bond and No. 3 is the payment bond.

Mr. LeGros: Thank you.

Q. (By Mr. LeGros): Mr. Anderson, handing you what has been marked as Plaintiff's Exhibit 2, can you tell me what that document is, please?

A. It's a copy of a performance bond. [18]

Q. And do you recognize your signature on that bond? A. Yes, sir.

Q. And do you recognize the signature of any other party on the first page?

A. I recognize the signature of Mary E. Galbraith.

Q. She is a corporate official in your corporation, or the corporation with which she was associated? A. She was at the time.

Q. Pardon me? A. She was at the time.

Q. She was assistant secretary at that time?

A. That's right.

Q. Now, turning to the reverse side of that document, do you recognize the signature of any party on that side? A. Yes.

Mr. LeGros: I will offer Exhibit 2.

Mr. Simon: I have no objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to that same document, Mr. Anderson, could you

(Testimony of Martin Anderson.)

tell me if the total amount of premium charged is indicated on that document? A. Yes, it is.

Q. And it says the rate of premium on this bond is what? [19] A. \$47,753.72.

Q. And that bond was signed by you and attested by one of your—your assistant secretary?

A. Yes.

Q. And it was delivered by you to Islands Construction Company, was it not?

A. That I do not remember.

Q. Do you know who filed that bond with the Government? A. I don't remember that.

Q. In searching your memory—

A. It was filed by one of the joint venturers, either by Anderson Construction Company or Islands, but I do not remember who.

Q. Either Anderson or Islands filed that bond with the Government? A. I think so.

Q. And do you know what time it was filed with the Government?

A. No, I don't know the exact date.

Q. It would be before the 17th of June, would it not, 1955? A. Probably.

The Court: You mentioned the joint venture and two of the members of it. Who was the other or third member?

A. Montin-Benson Company. [20]

Q. (By Mr. LeGros): Now, directing your attention, Mr. Anderson, to Plaintiff's Exhibit 3, what is that document, please?

A. It's a payment bond.

(Testimony of Martin Anderson.)

Q. Do you recognize your signature on that document? A. Yes.

Q. Do you recognize the signature of any other party on the first page?

A. Yes; Mary E. Galbraith.

Q. Turning to the back side of that bond, do you recognize the signature of any party on that page? A. Recognize what?

Q. The signature of any party on that page.

A. Very faintly.

Q. And who is that, please?

A. Mary E. Galbraith.

Q. She is the same Mary E. Galbraith that was assistant secretary in your corporation at that time?

A. That's right.

Q. And who attested your signature on the other bond? A. Yes.

Mr. LeGros: I'll offer Exhibit 3 into evidence.

Mr. Simon: No—

The Court: Plaintiff's Exhibit 3 is that [21] what you mean?

Mr. LeGros: Plaintiff's Exhibit 3.

Mr. Simon: No objection, Your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to the reverse side of Exhibit 3, what is indicated there as to the total amount of the premium charged?

(Testimony of Martin Anderson.)

A. It says, "Premium included in charge for performance bond."

Q. Now, Mr. Anderson, in organizing this joint venture what was the participating share of each of the members?

The Court: Do you mean of the joint venture?

Mr. LeGros: Yes, Your Honor.

A. We had twenty-five per cent, Montin-Benson Company had twenty-five per cent, and Islands Construction Company had fifty per cent.

Q. (By Mr. LeGros): And who was given the responsibility of managing this joint venture?

A. Islands Construction Company.

Q. By "management" was it indicated that they would take over all the administrative details of this contract?

A. They took over practically all of them [22] in some matters that—

Q. Who paid the bills? A. They did.

Q. Islands? A. Yes, sir.

Q. So it was only natural that bills should be sent to them?

Mr. Simon: I object to that as leading and argumentative.

The Court: The objection is overruled. As I understand, the rule permits cross examining an adverse witness.

Mr. Simon: Yes. If the Court please, the joint venture is not the defendant in this case, what would have been proper in dealings with the joint

(Testimony of Martin Anderson.)

venture. They have chosen to sue Mr. Martin Anderson, a one-fourth proprietor in this thing, individually without joining the joint venture, and what would have been normal procedure if they were billing—if this suit were against the joint venture, is quite a different thing from what would be normal procedure if they were seeking to hold Mr. Martin Anderson individually.

The Court: What is the purpose of the inquiry?

Mr. LeGros: If the Court please, it's simply to set up the business procedure of this joint venture. I think it's perfectly proper.

The Court: The objection is overruled.

Mr. LeGros: Would you read the question, Mr. Reporter.

(The reporter read the last question as follows: "Q. So it was only natural that bills should be sent to them?")

Q. (By Mr. LeGros): You may answer the question, Mr. Anderson.

Q. I do not know if these various vendors with whom we did business were notified who was the administrative joint venturer. After they were apprised of that I don't see why it shouldn't be sent to Islands Construction Company.

Q. Well, now, what's your answer?

Mr. Simon: I submit that he has answered, if the Court please.

The Court: The objection is overruled.

If he can answer it more directly, Counsel may ask him. A. In this instance?

(Testimony of Martin Anderson.)

Q. (By Mr. LeGros): Yes, in your business dealings with the joint venture. [24]

A. May I—

Mr. Simon: Objected to as irrelevant and immaterial. There are no business dealings with the joint venture that are material in this case.

The Court: That objection is overruled.

You may answer, Mr. Anderson.

A. May I elaborate a little?

Q. (By Mr. LeGros): Go ahead.

The Court: If it is necessary, Mr. Anderson, to explain. You should first give your answer directly, and if it is necessary to explain the answer to make it full, true and correct, you will have that opportunity in each instance.

A. I'll answer the question yes, but it so happened that our office is in the same building that McCollister's office is, and Mr. Beeson, it was convenient for him to come down to our office and discuss things, sometimes lay an invoice on our desk, knowing that it would be taken to the proper party for action.

Q. (By Mr. LeGros): Did he do that in the case of this bond?

A. You mean delivery of the bond?

Q. Deliver invoices to you.

A. I don't remember whether he did or not.

Q. In searching your memory you haven't been able to find [25] that out?

A. I can't at the moment.

(Testimony of Martin Anderson.)

Mr. LeGros: I have no further questions of this witness at this time.

The Court: Having in mind the possibility that defendant may wish to call this witness as its own, you may cross examine if you wish, Mr. Simon.

Cross Examination

Q. (By Mr. Simon): Mr. Anderson, calling your attention to Plaintiff's Exhibit 1, I call your attention to the third page of what you have denominated an application for a bond. At the top of the third page there are numerous blanks, are there not, which are appropriate to be filled in on the printed form by the insertion of written or type-written material? A. Yes.

Q. In two of those blanks there is a typewritten insertion in that portion of this document, is there not? A. That is right.

Q. One of those insertions consists of figures, \$47,753.72? A. That's right.

Q. The other insertion in typewriting is the word "various", v-a-r-i-o-u-s? [26]

A. Yes.

Q. I will ask you whether at the time you signed Plaintiff's Exhibit 1 those figures and that word were inserted in those blanks?

A. They were not.

Q. Mr. Anderson, calling your attention to Plaintiff's Exhibit No. 2—

Mr. Simon: And will you hand him also, Mr. Bruff, Plaintiff's Exhibit 3.

(Testimony of Martin Anderson.)

(The exhibits were handed to the witness.)

Q. (By Mr. Simon): Counsel for the plaintiff called to your attention certain language with reference to premium appearing on the back, appearing on Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3. I'll ask you whether that language with reference to the premium was not on the back of Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3 respectively, those recitals with reference to premium were on the back of those instruments?

A. Yes.

Q. Did you sign anything on the back of those instruments? **A.** No.

Q. Your signature is on the front of the instrument where you identified it? [27]

A. Yes.

Mr. Simon: That is all the cross examination I have at this time, Your Honor.

The Court: Any further interrogation of the witness?

Mr. LeGros: Yes, on redirect.

The Court: You may do so.

Redirect Examination

Q. (By Mr. LeGros): Mr. Anderson, on this occasion you have stated categorically that the figures \$47,753.72 were not on Plaintiff's Exhibit 1 when you signed it, and you're positive at this time?

The Court: You should indicate whether it is a question or a statement. The record will not show that—

(Testimony of Martin Anderson.)

Q. (By Mr. LeGros): Are you positive at this time that those figures were not on the application when you signed it?

A. Yes, I am positive.

Q. You recall your deposition being taken on April 23rd, 1957, in Mr. Simon's office?

A. Yes.

Q. And directing your attention particularly [28] to Page 11 of that deposition, at Line 22 this question was asked you by me:

"Q. Handing you Exhibit 1, I believe you have seen a copy of that which was included with the complaint that was served upon you, the application for the bond we have discussed, a performance bond and a payment bond. I direct your attention to the amount of the premium shown on the reverse side. What is that amount, please?"

The Court: The witness ought to be permitted to see what was then referred to as Exhibit 1. Can you show him what you then referred to as Exhibit 1?

Mr. LeGros: Yes. It's an exact duplicate of what he's got in front of him.

The Court: Will you look at that exhibit, then.

Q. (By Mr. LeGros): Look on Page 3 where the amount of \$47,753.72 is shown. I asked you,

"Q. . . . What is that amount, please?"

And you answered, "A. \$47,753.72."

I then asked you, "Q. I will ask you specifically

(Testimony of Martin Anderson.)

if that [29] blank was filled in when you signed that form?"

And you answered on that occasion, "A. I don't remember whether it was or not."

Now, Mr. Anderson, what is your testimony at this time?

A. I testify that it was not filled in.

Q. You were under oath on that prior occasion, were you not? A. Yes.

Q. Were you deliberately misleading me?

A. No, sir.

Q. What has caused the change in your testimony?

A. I have signed many of these bond applications in blank. I have never—

Q. I'm not asking you about that, Mr. Anderson. I'm asking you why the difference in your testimony between April 23rd and this date now.

A. I think it's impossible to have a figure in there when you sign a bid bond application because nobody knows what the amount is going to be until the job is bid and you know the contract amount.

Q. All right. Then I'm asking you now, what is your correct testimony?

A. That it was not filled in. [30]

Q. Then you were in error on April the 23rd?

Mr. Simon: I object to that as not being a proper inference.

The Court: The objection is overruled.

Q. (By Mr. LeGros): You may answer.

(Testimony of Martin Anderson.)

Mr. Simon: Well, if the Court please, I don't know whether the Court knows what his answer was.

The Court: The Court has ruled. This is cross examination.

A. It may have been partly in error.

Mr. LeGros: That's all.

The Court: Is there anything else, Mr. Simon?

Mr. Simon: May I inquire what page that was on?

Mr. LeGros: Pages 11 and 12.

The Court: Beginning at Line 22, I believe.

Mr. Simon: Will you please hand Mr. Anderson Plaintiff's Exhibit 2.

The Court: That will be done.

The Clerk: He has it.

Mr. Simon: All right.

Recross Examination

Q. (By Mr. Simon): At the time of the interrogation concerning which [31] Counsel has asked you, I'll ask you whether he didn't ask you,

"Q. Handing you Exhibit 1, I believe you have seen a copy of that which was included with the complaint that was served on you, the application for the bonds which we've discussed, the performance bond and the payment bond. I direct your attention to the amount of premium shown on the reverse side."

I'll ask you whether that interrogation did not have as its object and whether your attention was

(Testimony of Martin Anderson.)

not directed to the reverse side of Plaintiff's 2, the performance bond, and whether when he said, "What is the amount, please?" you did not answer, "\$47,753.72." And,

"Q. I will ask you specifically if that blank was filled in when you signed the form?"

whether you did not answer,

"A. I don't remember whether it was or not."

Now, isn't that what transpired? A. Yes.

Mr. Simon: That's all.

Mr. LeGros: No further questions. [32]

The Court: The witness is excused from the stand.

(Witness excused.)

The Court: We will have a short recess for about ten minutes. The jury will retire, remembering the Court's previous admonitions.

(Short recess.)

The Court: All are present as before the recess. You may now proceed.

Mr. LeGros: I would like at this time to call Mr. Oja as an adverse witness.

The Court: Come forward and be sworn as an adverse witness.

VERN OJA

called as an adverse witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full, please? A. Vern Oja.

Q. And your address please, sir?

A. 13023 Holmes Point Drive Northeast, Kirkland.

Q. And what is your employment, sir?

A. Secretary-treasurer of Islands Construction Company. [33]

Q. And were you so engaged in May and June of 1957-1955? A. I was.

Q. And have you been so employed continuously since that date? A. Yes.

Q. You are here in response to a subpoena duces tecum? A. Yes, sir.

Q. Did I ask you to bring statements of account with you as submitted to the joint venture composed of Islands Construction Company, Anderson Construction Company, Inc., and Montin-Benson Corporation? A. Yes, sir.

Q. Do you have those with you?

A. Well, I have some and Mr. Simon, our Counsel, has the others, I believe.

Q. I would ask that the statements of account that you received in connection with this bond premium be given to the clerk for marking.

A. That's one. I think I might have another one here. I don't believe that I have all the statements

(Testimony of Vern Oja.)

that they possibly rendered to us because—they make six copies of everything, and—that's in connection with this also. I believe you have all of them there. Those are all the ones I have in my file. [34]

Q. From your records, Mr. Oja, can you tell me when the first statement of account was received by you?

Mr. Simon: If the Court please, I should like to object upon the ground that it's irrelevant and immaterial to any issue between Mr. Anderson and the United States Fidelity & Guaranty Company what statements were sent by McCollister & Company to Islands.

The Court: The objection is overruled. You may answer, Mr. Oja.

A. I believe I received an original statement approximately June 13th, 1955, which showed the amount of the bond premium as calculated by McCollister & Company.

Q. (By Mr. LeGros): And what was the amount of that premium, please?

A. I think it was—

Mr. Simon: I object to that as not the best evidence, and may it be understood that I have a continuing objection on this line of inquiry as previously stated?

The Court: The previous objection is overruled. The present one, in so far as it is an additional objection, is sustained until it is shown that it is the best evidence.

The Clerk: Plaintiff's Exhibit 4. [35]

(Testimony of Vern Oja.)

(Statements of account were marked Plaintiff's Exhibit No. 4 for identification.)

Mr. LeGros: I will offer Plaintiff's Exhibit 4.

Mr. Simon: I object—

The Court: Have you seen them?

Mr. Simon: Yes, I have seen them. I renew the objection to all of them that I have heretofore raised with reference to the inquiry concerning one, that these purport to be statements from McColister & Company to Islands Construction Company, and as such they are irrelevant and immaterial.

The Court: I have not heard any testimony since these were marked identifying these with any questions Counsel may ask as preliminary questions as to the history behind these papers which are part of this Exhibit 4 for identification.

Mr. LeGros: If the Court please, these exhibits are offered pursuant to pretrial order.

The Court: May I have the file, Mr. Clerk.

The Clerk: Yes, your Honor (handing file to the Court).

Mr. LeGros: Which was signed by Mr. Simon, at which time we discussed these very exhibits and he admitted them into evidence. [36]

The Court: What testimony has this witness given indicating the relevancy of them? Just in the briefest possible way.

Mr. LeGros: That these are statements of account submitted to Islands Construction Company as manager of the joint venture.

(Testimony of Vern Oja.)

The Court: Did he say they were?

Mr. LeGros: Yes, your Honor.

The Court: They had not been marked up to that time and I am not sure that he was talking about these when he was talking about the subject of having at one time received something of this nature.

Mr. LeGros: Yes, your Honor, that's what he was talking about.

The Court: I am not sure that it is so shown in the evidence. You may let him see those exhibits, if you wish, and see if you wish to ask him any questions about it.

Q. (By Mr. LeGros): Do you have the exhibit before you, Mr. Oja?

The Court: Plaintiff's Exhibit 4, the papers comprising it.

Q. (By Mr. LeGros): Do you have it before you? A. Yes, I do.

Q. And are those statements of account received by you [37] from McCollister & Co., Inc.?

A. Yes, they are.

Q. And are those in connection with a joint venture that Islands Construction Company, Anderson Construction Company and Montin-Benson Corporation were engaged in? A. Yes.

Q. And that is the Elmendorf-Ladd Air Force Base operation? A. Yes.

Q. And was Islands Construction Company designated as the manager of that joint venture?

A. Yes, sir.

(Testimony of Vern Oja.)

Q. And as manager of that joint venture did your organization receive those statements of account? A. Yes, sir.

Mr. LeGros: I'll now offer Plaintiff's 4.

Mr. Simon: It's objected to upon the ground that they are irrelevant and immaterial, for the reason and upon the ground that in this case between the United States Fidelity & Guaranty Company as plaintiff and Anderson Construction Company as defendant no statements of account rendered by McCollister & Company to Islands Construction Company are either relevant or material, and I call to the Court's attention in support of that position and against the suggestion of Counsel that I may have waived the provisions of Paragraph [38] V on Page 10 of the pretrial order herein, starting with the second sentence.

The Court: The Court was considering your objection in the light of the testimony concerning relevancy and not in the light of any statement in the pretrial order. If the statement in the pretrial order is to the contrary, Mr. Simon, I would be very much interested to see that. Is there a contrary provision in the pretrial order?

Mr. Simon: The statement of the pretrial order is that, "No statements of account were rendered by the plaintiff to this defendant."

The Court: What line on what page? Did you say Page 10?

Mr. Simon: Yes, Page 10, Line 7.

(Testimony of Vern Oja.)

The Court: The objection is overruled, gentlemen.

Mr. LeGros: I will renew my offer of Exhibit 4.

The Court: Plaintiff's Exhibit 4 is now admitted.

(Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to the first of the statements of account, you have previously [39] indicated that that statement was received by you on or about June 13, 1955?

A. Well, I'll have to correct that statement. The statement is dated June 15th, so it must have been sometime after June 15th.

Q. When was the next one received?

A. Well, the next one I have here was received sometime after the 1st of September. It's merely a statement of the account that McCollister Company rendered to the joint venture.

Q. Do you find, Mr. Oja, that you received a statement of account on July 1st, 1955?

A. It's very likely that I did, but I don't have it in our files.

Q. And on August 1, 1955?

A. I believe that could be so, as they rendered them every month.

Q. Yes. And what was the amount indicated on the first statement of account that you received?

A. Well, reading this one, the balance due is thirty-five thousand eight—

(Testimony of Vern Oja.)

Q. Directing your attention to the first statement of account.

A. Well, this original invoice—this is an invoice, not a statement. \$47,753.72. [40]

Q. Yes, and was that the amount that was billed you in July and in August?

A. This is the amount that was billed to us in June.

Q. Yes, and I'm asking——

The Court: What year?

A. June, 1955.

Q. (By Mr. LeGros): I'm asking, was that same amount billed to you in July and August?

A. It was not billed. It was shown on a statement as an account owed.

Q. As an account owed, and you received such a statement? A. Yes.

Q. In that same amount in July and August?

A. Well, I don't have copies of those particular statements here, so I can't—I would assume they would probably be in the same amount.

Q. And did you receive a statement of account on September 1, 1955? A. Yes, I did.

Q. And what does that indicate?

A. It shows a balance due of \$35,815.29.

Q. And how do they arrive at that balance?

A. They arrived at that balance by showing, "Contract Elmendorf Air Force Base, \$47,753.72. Return premium: 25% of this contract to be reported by Oklahoma Office, [41] \$11,938.43," and

(Testimony of Vern Oja.)

net balance due McCollister & Company of \$35,-
815.29.

The Court: Mr. LeGros, it might be a great convenience to this jury if you let it be shown in your question that you are directing his attention to the exhibit.

Mr. LeGros: I asked him to refer to his exhibit under date of September 1.

The Court: You did it in such a way that I could not tell whether you were asking a new question the answer to which was to be stated orally or whether it was something you were asking him to read from the contents of Exhibit 4.

Mr. LeGros: Yes, your Honor.

Q. (By Mr. LeGros): Directing your attention, Mr. Oja, to Exhibit 4— A. Yes.

Q. —and to the statement under date of September 1, 1955, included therewith, I'm asking you, you have just completed reading from that statement? A. Yes.

Mr. LeGros: I have no further questions of this witness.

The Court: You may examine, having in mind your intention as to calling or not calling this witness [42] in the future as a witness for the defendant.

Mr. Simon: If the Court please, in connection with Plaintiff's Exhibit 4 I should like to have marked for identification this letter of September 14th.

The Court: That will be done.

(Testimony of Vern Oja.)

The Clerk: Defendant's Exhibit No. A-1.

(A letter was marked Defendant's Exhibit No. A-1 for identification.)

Cross Examination

Q. (By Mr. Simon): Mr. Oja, calling your attention to what has been marked for identification as Defendant's Exhibit A-1, I'll ask you whether you recognize that? A. I do.

Q. Is that the original of a communication received by you from McCollister & Company in connection with this same line of statements and bills that Counsel has interrogated you about?

A. It is.

The Court: Who is the addressee of that communication? What is the form of the name of the addressee of that communication?

A. Islands Construction Company.

Q. (By Mr. Simon): I'll ask you whether it has reference [43] to the same obligation that was the subject of Counsel's interrogation of you?

A. It does not have reference to the same obligation. It's a lesser amount.

Q. I'm asking you, does the amount referred to arise out of the execution of the bonds?

A. Yes, it does.

Q. The very bonds in question?

A. Yes, sir.

Q. When did you receive that document?

A. September 15, 1955. It's marked right on the face of it.

(Testimony of Vern Oja.)

Q. Is that your receipt stamp?

A. Yes, it is.

Mr. Simon: I'll offer that in evidence.

Mr. LeGros: I have no objections.

The Court: Admitted.

(Defendant's Exhibit No. A-1 for identification was admitted in evidence.)

The Court: Anything else?

Mr. Simon: Yes. I would like to have the witness read it.

The Court: That may now be done.

Q. (By Mr. Simon): Will you please read that?

A. Yes. This is McCollister & Company, Incorporated, [44] General Agents, 300 Central Building, Seattle 4, Washington. September 14, 1955. Islands Construction Company, Inc., 1103 North 36th, Seattle 3, Washington.

“Gentlemen:

“On September 1, 1955, a statement was sent you showing an amount due of \$35,815.29. This, of course, covers the bond, dated June 3, 1955, for Elmendorf Air Force Base. We understood that this was to be paid in three installments of one third each and we would appreciate it if you would let us have one third of this at this time as we are in need of funds to pay our Companies.

“Very truly yours, McCollister & Company, Inc.”

Signed by M. G. Worthing, Treasurer.

Mr. Simon: That's all at this time.

(Testimony of Vern Oja.)

Redirect Examination

Q. (By Mr. LeGros): Mr. Oja, you have previously referred in my direct examination to the statement of account under date of September 1, 1955? A. Yes.

Q. And that shows also a balance due of \$35,815.29, does [45] it not? A. Yes, sir.

Q. After showing the 25 per cent through the Oklahoma office, deducting that amount from the total premium price?

A. Well, I don't have that statement in front of me but I assume that's what it says.

(Plaintiff's Exhibit No. 4 was handed to the witness.)

Q. I'm directing your attention to the statement of September 1 contained in Exhibit 4. The balance shown due there is also \$35,815.29, is it not?

A. Yes.

Q. And that balance is arrived at by deducting 25 per cent of this contract to be reported by Oklahoma City office?

A. By Oklahoma office, yes.

Q. Yes. Now referring further to Exhibit 4, does that exhibit include a statement of account submitted to you by the Oklahoma City office of Ancel Earp?

A. Yes, but of a much later date.

Q. And what is that date?

A. October — well, it was probably received about October 15th, as this received stamp here October 6, 1955, was probably rendered to one of

(Testimony of Vern Oja.)

the other joint venturers and it was probably received by our office probably [46] seven days later.

Q. It was sent to you by one of the other joint venturers?

A. Yes, I believe that was the case.

Q. Probably the Oklahoma City joint venturer?

A. It could be.

Q. And what is that amount, please?

A. \$11,938.43.

Q. That is the same amount shown on the September 1st statement to be reported by Oklahoma office? A. It is.

Mr. LeGros: That's all.

The Court: Anything further?

Recross Examination

Q. (By Mr. Simon): Mr. Oja, until you received that last statement in October which you have just been testifying about from Ancel Earp, had you ever heard of Ancel Earp?

A. I did not.

The Court: Is there anything else? Are you finished, Mr. Simon?

Mr. Simon: Yes, your Honor.

The Court: Have you finished?

Mr. LeGros: I have finished with this witness.

The Court: This witness is excused.

(Witness excused.) [47]

The Court: Call the next plaintiff's witness.

Mr. LeGros: Call at this time as an adverse witness Mr. Loren Baldwin.

The Court: Come forward and be sworn as an adverse witness.

LOREN ELLSWORTH BALDWIN called as an adverse witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full, please?

A. Loren Ellsworth Baldwin.

The Court: Warren?

A. Loren Ellsworth Baldwin.

Q. (By Mr. LeGros): And where do you reside, sir? A. 6421 Windemere Road.

The Court: Where?

A. Seattle.

Q. (By Mr. LeGros): And other than being my landlord what is your occupation?

A. Contractor.

Q. Now, Mr. Baldwin, what is your official duty with the Islands Construction Company? [48]

A. President.

Q. And how long have you been president of that concern? A. Six years.

Q. When was it that—

The Court: President of which concern did you say?

A. Islands Construction Company.

Q. (By Mr. LeGros): And when was it that a joint venture was formed between Islands Construction Company, Anderson Construction Company and Montin-Benson Corporation?

(Testimony of Loren Ellsworth Baldwin.)

A. In May, 1955.

Q. And was this joint venture formed for one specific operation? A. Yes, it was.

Q. And what was that, please?

A. For the construction of a project known as 826 in Alaska.

Q. That's what we have previously referred to as the Ladd-Elmendorf Air Force project?

A. (Witness nods his head.)

Q. You'll have to answer because the reporter is taking this down. A. Yes.

Q. Now, Mr. Baldwin, could you briefly tell us what was [49] the scope of that project?

A. Well, it was the construction of three hangars, one field house, some ammunition igloos, an electronic building, and that's about it.

Q. Can you tell us approximately in dollars what that job amounted to?

A. About six million dollars.

Q. And did that job at the time it was being contemplated exceed the capacity of any one of the companies in the joint venture?

A. No, it did not.

Q. Why was a joint venture organized then on this project?

A. Well, I think mainly to minimize the risk of operating a contract of that type in Alaska.

Q. And what were the rights and obligations of the various members of the joint venture as it was constituted?

(Testimony of Loren Ellsworth Baldwin.)

Mr. Simon: That's objected to as irrelevant and immaterial, not the best evidence.

Mr. LeGros: I think he as president and managing agent—

The Court: Read with respect to what. That part of the question I want to hear.

(The reporter read the last question.)

Mr. LeGros: One to the other.

The Court: The objection is overruled. [50]

A. Well, we—Islands Construction Company were the managing directors of the contract. We have—

The Court: What do you mean by that? Do you mean the joint venture in respect to the contract or do you mean something else?

A. No, I mean the joint venture. We managed the joint venture.

The Court: You may proceed.

A. But it is done under an agreement which we sign prior to the procedure of our work. I believe this agreement calls for our company to be the—

The Court: Now wait just a minute. If there is objection to that, the Court—

Mr. Simon: I have already made my objection, if the Court please, and the Court overruled it.

The Court: The objection to this part of it is sustained. He cannot state what the agreement said.

Q. (By Mr. LeGros): Do you have a copy of that agreement?

A. I don't have a copy with me, no, sir.

Q. A copy can be produced?

(Testimony of Loren Ellsworth Baldwin.)

A. I'm sure it can.

Mr. LeGros: I will make demand upon Counsel now for a copy of the agreement between the joint venturers.

Mr. Simon: I object to it as irrelevant and [51] immaterial, confidential, of no importance to this case.

The Court: The objection is overruled.

Mr. Simon: Is the Court directing me to produce a copy of this agreement?

The Court: The Court recognizes the validity of the demand, and Counsel might have certain rights to use as secondary of the agreement if Counsel for the construction company in question did not produce it, Counsel might have certain privileges, and the Court does rule that the demand is a valid demand. You may do that tomorrow, not now. You may have until tomorrow to do that.

Q. (By Mr. LeGros): Mr. Baldwin, as manager of the joint venture was it one of your duties to make payments on statements of account rendered to the joint venture?

A. That is correct, but I believe the—that is correct.

Q. And in that capacity did you sign checks payable to McCollister & Company on the statements of account as submitted by them?

A. I signed checks to McCollister & Company.

Q. You are here under a subpoena duces tecum and I asked you to bring with you cancelled checks

(Testimony of Loren Ellsworth Baldwin.)
made payable to McCollister & Company. Do you
have them?

A. I believe our Counsel has them. [52]

Mr. LeGros: I ask that they be marked.

The Court: That may be done.

The Clerk: They will be marked Plaintiff's Ex-
hibit 5.

(Two cancelled checks were marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. LeGros): Directing your attention
to Plaintiff's Exhibit 5, which is composed of two
cancelled checks, could you give me the date of the
earliest of the two checks?

A. The first one is September the 12th. The
amount is \$11,938.43 and—

The Court: Wait just a minute. Do not state
what the contents are yet.

Q. (By Mr. LeGros): That date again is what?

A. September 12th.

Q. September 12th? A. Yes.

Mr. LeGros: I will offer Plaintiff's Exhibit 5.

The Court: Admitted.

(Plaintiff's Exhibit No. 5 for identification
was admitted in evidence.)

Q. (By Mr. LeGros): Now referring to the—

The Court: Now you may have him read the
[53] amounts, if you wish to do so.

Mr. LeGros: Yes.

Q. (By Mr. LeGros): Referring to the check
bearing the date of September 12th, is that the date

(Testimony of Loren Ellsworth Baldwin.)
upon which you signed it or the date upon which
the check was drawn, if you recall?

A. I don't recall that, sir.

Q. The check shows it was drawn on September
12th, however, does it not? A. That's right.

Q. And what is the amount of that, please?

A. \$11,938.43.

The Court: 28 or 38 dollars, the end of the dol-
lars digits?

A. \$11,938.43.

The Court: Nine-three-eight forty—

A. —three cents.

The Court: You may inquire.

Q. (By Mr. LeGros): Now directing your at-
tention to the second of the two checks, what date
does that bear? A. October 17, 1955.

Q. And could you tell me whether the check
was signed by you on that date or whether it was
drawn on that date, if you can recall?

A. No, I can't recall. [54]

Q. And what is the amount of that check, please?

A. \$11,938.43.

Q. Mr. Baldwin, your checks, when they are
drawn, are they in two parts? That is, is there a
perforation to which is attached a second portion
which is removed by the person to whom the check
is made payable before deposit? A. Yes, sir.

The Clerk: Plaintiff's Exhibit No. 6.

(Two vouchers were marked Plaintiff's Ex-
hibit No. 6 for identification.)

(Testimony of Loren Ellsworth Baldwin.)

Q. (By Mr. LeGros): Mr. Baldwin, I'll ask you to examine Plaintiff's Exhibit No. 6 which has just been presented to you and ask if you recognize that as the second half portion of each of the checks, a photostat of the second half portion of each of the checks we have referred to?

A. No, I do not recognize it.

Q. Is it similar to the information contained on your second half portions of your checks as to the printed material on there? A. Yes, it is.

Q. And what—

A. Well, the amount of money indicates that it's the same, and I imagine it is, but I don't recognize it. [55]

Q. It has all the appearances of being the same?

A. Yes.

Mr. LeGros: I'll offer Plaintiff's 6.

The Court: Admitted.

(Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

Mr. LeGros: I have no further questions of this witness.

Cross Examination

Q. (By Mr. Simon): Mr. Baldwin, on Plaintiff's Exhibit 6 which Counsel just asked you about I notice that there are two of these vouchers, if you can call them that, in Exhibit 6. It consists of two vouchers. Will you look at them, please. In the upper left-hand corner of one of them there are some figures, or in the upper left-hand corner of both

(Testimony of Loren Ellsworth Baldwin.)
of them there are some figures. Do you know by whom those figures were placed there?

A. No, sir.

Q. What are those figures?

A. One of them reads, "9-19-1955", which I — and the other reads, "10-21-1955".

Q. Do you know anything about who put those figures there or what they represent other than the inference that [56] they probably represent a date?

A. I have no idea, sir.

Mr. Simon: I have no further questions of this witness at this time.

The Court: Is that all?

Mr. LeGros: Yes, Your Honor.

The Court: This witness is excused.

(Witness excused.)

The Court: I believe that we will excuse the jury at this time, too. Will Counsel approach the bench for a moment.

(The Court and Counsel conferred privately.)

The Court: Members of the jury, Counsel and the trial judge will have a good deal of work sometime tomorrow together in the absence of the jury in matters that do not concern the jury. There is a strong likelihood now that this case will go to the jury late tomorrow afternoon. If it does, as to how much longer the jury will need after that to deliberate is a matter that then more or less will be in the jury's own hands, and you cannot tell now and you should not try to tell now, either, how long that

will take, because the case has not been submitted to you yet. There are a good many important things to be done [57] yet before the case will be submitted, to hear the evidence offered by the defendant among other important things.

You should tell everybody in your home who might be concerned about your long absence from home or long delay in arriving home at the end of tomorrow's day or work day or arriving home for dinner or anything of that sort to please excuse you from any thought that they might have that you would be home for dinner, because I do not think it likely that you will be:

I think, though, that I should ask you to be prepared to stay together overnight. That sometimes becomes necessary, and nobody in the world can tell that except the jurors themselves after they begin working and deliberating together, and when it becomes necessary in a case as important as this to do that the Court makes arrangements for the proper and suitable lodging of the jurors in a hotel, and so I think you should tell your family members not to look for you until they saw you coming and not be surprised if you did not get home at all that night, tomorrow night.

I do not wish to disturb your home lives, and neither do Counsel or any party or parties connected with this case, but at the same time if the case should be submitted the Court would not be hasty about ending [58] the jury's deliberations in the case. The Court would give the jury plenty of

time if they felt they needed more time to deliberate in the case.

And so you better be prepared with sufficient necessary attire to remain away from home overnight, and that relates to both men and women jurors, and the men will be interested, of course, in shaving kits and things of that sort.

And the men, I ask all of you who drive your cars here tomorrow, that you put them in a place where you will not have to ask anybody's leave, anybody's permission to get a key to move that car. Leave the car in such place that you can always go to it and always have available the key to it at any hour of the day or night. Otherwise you might be greatly inconvenienced.

The jury, subject to the Court's previous admonition, is excused until tomorrow morning at 9:30. You may now retire subject to the Court's previous admonitions, which the Court requests that you strictly apply to all of your conduct until the further order of this Court.

The jury will now retire until tomorrow morning at 9:30. Be here at that time. [59]

(The following proceedings were had without the presence of the jury:)

Mr. Simon: May I address the Court, please?

The Court: Yes.

Mr. Simon: Mr. Palmer informs me that we have with us some of our forms of requested instructions which we are perfectly willing to deliver now.

The Court: I hope you will serve them on opposing Counsel and give the clerk two copies, if you please, Mr. Palmer, the original ribbon and a legible carbon, the original bearing acceptance of service by opposing counsel. Do not permanently staple them together; use an ordinary paper clip that can be removed.

We may have a few minutes in the morning of something else, but we just cannot help that. We have something scheduled tomorrow morning that we want to attend to.

Counsel are excused until 9:30 tomorrow morning and the court is recessed until 9:15 tomorrow morning.

(Thereupon, at 4:45 o'clock p.m., a recess herein was taken until 9:30 o'clock a.m., Wednesday, May 15, 1957.) [60]

Wednesday, May 15, 1957. 10:45 O'Clock A.M.

(All parties present as before.)

The Court: Do Counsel wish to make any statement which is of concern to them or which they would like the Court to deal with in the absence of the jury?

Mr. LeGros: No, your Honor.

Mr. Simon: Not at this time, your Honor.

The Court: Then we will take the midmorning recess at this time for about ten minutes, and I ask the bailiff to notify the jurors that they will now consider this the midmorning recess and be ready to return to the jury box within a few minutes.

The Bailiff: Yes, your Honor.

(Short recess.)

(The following proceedings were had within the presence of the jury):

The Court: Let the record show that all of the jurors are present and also that all parties on trial with their Counsel are present and are represented by Counsel.

Mr. Simon, did you have something you wish to say?

Mr. Simon: Yes. May it please the Court, [61] in the course of the cross examination as an adverse witness, or the examination as an adverse witness of Mr. Loren Baldwin yesterday by Mr. LeGros, Mr. LeGros made demand upon me that I produce a copy of the joint venture agreement that he referred to in his testimony. I have delivered that to Mr. LeGros, and I should like the record to so show.

The Court: Is there any objection to the record showing that, Mr. LeGros?

Mr. LeGros: No, your Honor. I have it before me.

If the Court please, I should like at this time to recall Mr. Baldwin as an adverse witness for the purpose of some additional questions, both in regard to this agreement and in regard to one or two other matters.

The Court: I promised, and I believe you had no objection, that Mr. Simon might make a request about some other witness' convenience. Do you wish to make any such now at this point?

Mr. Simon: That witness is expected at 11:30,

your Honor. I should like, with the Court's permission and with Mr. LeGros' acquiescence, to interrupt when he arrives.

Mr. LeGros: Certainly. [62]

The Court: That will be granted.

Mr. Simon: I have no objection to the request of Counsel at the present time.

The Court: Mr. Baldwin, would you kindly resume the stand for further interrogation of you as an adverse witness so far as concerns the plaintiff.

LOREN ELLSWORTH BALDWIN recalled as an adverse witness by plaintiff, being previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. LeGros): Mr. Baldwin, in your capacity as president of Islands Construction Company did you sign on behalf of your company certain payment bond and performance bond in this connection? A. I'm sure I did.

Q. Handing you what has been marked as Exhibit—

Mr. LeGros: There are two of them there.

The Clerk: Do you want them marked together?

Mr. LeGros: They can be marked together, yes.

The Clerk: It will be Plaintiff's Exhibit No. 7.

(A performance bond and payment bond were marked Plaintiff's Exhibit No. 7 for identification.)

Mr. LeGros: If the Court please, I would like

(Testimony of Loren Ellsworth Baldwin.)

[63] to also pass up typed duplicates of those bonds which I think will be much more legible and ask the witness to compare them, and it may be that we can substitute these for the photo copies.

The Court: A circumstance which for the sake of those hereafter considering the exhibit might be desirable.

Mr. LeGros: Does the witness have——

Mr. Simon: No, I have it.

(Plaintiff's Exhibit No. 7 for identification was handed to the witness.)

Q. (By Mr. LeGros): Mr. Baldwin, I ask you to compare the photo copy—first of all I'll ask you, do you recognize your signature on those documents? A. Yes, sir.

Q. And do you recognize the signature of Mr. Vern Oja, your secretary who attested to your signature? A. Yes.

Q. And are those the documents you signed? Are those photo copies of documents you signed?

A. Photo copies of the documents.

Q. I'll ask you now to compare the typewritten copies which have been passed to you.

Mr. Simon: If I may interrupt, if the Court please, my only objection to this exhibit is on the [64] basis of its lack of materiality. This is a bond executed by Islands Construction Company which we maintain has nothing to do with—I mean is not involved in this suit, which is a suit on the premium on the Anderson bond.

Except for that objection,—I mean I submit that

(Testimony of Loren Ellsworth Baldwin.)
objection to the Court, and I will say that after the Court has ruled on that objection one way or the other I shall have perhaps a suggestion to make which would simplify the procedure further.

The Court: Very well. On what issue do you offer this as claimed material evidence, if you do so offer it?

Mr. LeGros: I'm offering it as a course of conduct as to the joint venture to show what took place in this instance which I think will show the same thing took place in the instance of Mr. Anderson and in the instance of Mr. Montin in the execution of the bonds and the information which is contained on the bonds. Since this is a joint venture and they are treated at law as a partnership, I think it is very material as to the acts of one as bearing upon the acts of the other.

Mr. Simon: My position about that is, very briefly, your Honor, that the acts of one partner undoubtedly bind the partnership, but when one [65] partner is sued individually the acts of the partnership are not binding upon him as an individual, and that in short is the basis of my objection.

The Court: Do you contend that this exhibit as evidence if admitted has any bearing upon the joint venture, the entire relationship of the various venturers?

Mr. LeGros: Yes, your Honor.

The Court: And that their action was in unison

(Testimony of Loren Ellsworth Baldwin.) with respect to how they went about business of like nature?

Mr. LeGros: Yes, your Honor.

The Court: And do you also seek to show that those acts which you claim are similar concerned this one undertaking, this one construction contract?

Mr. LeGros: The entire joint venture was concerned with this one construction contract.

The Court: The objection is overruled. Now Mr. Simon.

Mr. Simon: Upon Mr. LeGros' representation, upon his assurance that he has compared this copy which he now proposes and that it is in all respects like the photostat which has been identified by the witness, I will offer no objection to the reception in evidence of that copy. [66]

Mr. LeGros: I can make that assurance, Mr. Simon.

The Court: Very well. Do you wish the copy to be used instead of the——

Mr. LeGros: I ask that the typed copy be marked as Exhibit 7.

The Court: Very well, and the other photostat which is obviously a bad photostat job, probably through no fault of the photographer but merely because of the character of the instrument and the nature of the printing on the paper, it is not really usable, I ask the clerk to put the clerk's marks on the typewritten one and take the clerk's marks

(Testimony of Loren Ellsworth Baldwin.)
off of the other photostat copy. Return the photo-
stat copy to Counsel who produced it.

Q. (By Mr. LeGros): Now, Mr. Baldwin, re-
ferring to the documents which you have before
you as Exhibit 7, and referring to the reverse side
of the document entitled Performance Bond, I'll
ask if there is an amount of premium filled in on
that copy?

The Court: You did offer this, did you not?

Mr. LeGros: Yes.

The Court: And the objection was made to it
and deemed by the Court to have been made to it
after the offer of it in evidence was received. [67]
The Court's ruling previously announced on the
objection is deemed to have been made after such
things were done, and this Plaintiff's Exhibit 7 is
and was admitted in evidence.

(Plaintiff's Exhibit No. 7 for identification
was admitted in evidence.)

Q. (By Mr. LeGros): Do you find a premium
figure inserted there, Mr. Baldwin?

A. Yes, I do.

Q. And what is the amount of that premium?

A. \$47,753.72.

Q. And was that amount on the document at
the time you signed it? A. Yes, it was.

Q. And Mr. Baldwin, as manager of the joint
venture did you assemble the various executed
bonds from the other members of the joint venture?

A. I'm sure I did.

Q. And did you through your organization

(Testimony of Loren Ellsworth Baldwin.)
transmit them to the Corps of Engineers of the
United States Government at Anchorage, Alaska?

A. I'm sure we did, sir.

Q. And that was the office with which those
bonds were required to be lodged, was it not?

A. Would you repeat that?

Q. That was the office at which the bonds were
required to be lodged? [68] A. That's right.

Q. And did you send the bonds up with a letter
of transmittal? A. Yes, we did.

Q. I have asked you to produce that letter of
transmittal. A. Our Counsel has it.

Mr. LeGros: I'll ask that the copy of the letter
which I understand is a copy of the office copy,
original office copy—

Mr. Simon: No, this is the office copy, as I un-
derstand it.

The Clerk: This will be Plaintiff's No. 8.

(Copy of letter was marked Plaintiff's Ex-
hibit No. 8 for identification.)

Q. (By Mr. LeGros): Mr. Baldwin, I'll ask
you to examine Plaintiff's Exhibit 8, and is that
your office copy of the letter of transmittal with
which the bonds were enclosed and which was sent
to the Corps of Engineers at Anchorage?

A. Yes, I'm sure it is.

Q. And that letter is from the records of your
office? A. Yes, sir.

Q. And it pertains to the business of this joint
venture? A. Yes, sir. [69]

Q. And by whom is it signed, please?

(Testimony of Loren Ellsworth Baldwin.)

A. A. R. Thompson.

Q. Is he a member of your organization?

A. Yes.

Q. And what is his capacity, please?

A. Well, he's the business manager of our company at Anchorage, Alaska.

Q. And what is the date on that letter of transmittal? A. June 13, 1955.

Mr. LeGros: I will offer Plaintiff's 8.

Mr. Simon: Save only the objection heretofore made as to materiality of the transactions of the joint venture in this lawsuit I have no other objection to add, your Honor.

The Court: Do you offer it for a purpose? If so, state what issues it is material to in this case.

Q. (By Mr. LeGros): Was the bond executed by the Anderson Construction Company included in the bonds referred to in that letter?

A. I'm sure they were, sir.

Q. On that basis—

The Court: On what issue do you offer it?

Mr. LeGros: If the Court please, it definitely fixes the time at which the executed bonds, including the bonds of the Anderson Construction [70] Company, were assembled in Seattle and sent to Alaska, and it definitely shows that the bond premium at that time was ascertained with particularity.

The Court: The objection is overruled. Plaintiff's Exhibit 8 is now admitted.

(Testimony of Loren Ellsworth Baldwin.)

(Plaintiff's Exhibit No. 8 for identification was admitted in evidence.)

The Court: What do you call it? What one-word name may be attributable to it to reflect the character of the information contained in it?

Mr. LeGros: A letter of bond transmittal.

Q. (By Mr. LeGros): Now, Mr. Baldwin, yesterday you testified as to payments made in September and October of 1955 on the bonds in question, did you not? A. No, sir.

Q. I asked you about the checks that you had signed?

A. Yes, I signed the checks, but I mean there was no testimony—

Q. And you testified that the checks were sent to the McCollister Company?

A. I signed them, but I don't know—

Q. Now, in each instance before signing the checks did you discuss this matter with Mr. Martin Anderson? A. Yes, I did.

Q. So he was aware that you were sending out [71] the check in each case before it went out?

A. I'm sure he was.

Q. Now, Mr. Baldwin, this joint venture, as you have stated, was formed for the particular job of the Elmendorf-Ladd Air Force Base, is that not correct? A. Yes.

Q. And did the joint venture execute a joint venture agreement? A. Yes.

Q. And under what date was that agreement signed?

(Testimony of Loren Ellsworth Baldwin.)

A. I can't say, sir, if it was signed in May or June. I imagine it was signed in June.

Q. Would the 14th day of June, 1955, refresh your memory?

A. No, it doesn't, but the document would show.

(Mr. LeGros conferred privately with Mr. Simon.)

The Court: I ask Counsel to let the Court assist them. Do not interrupt interrogation for a conference without the Court's approval.

Mr. LeGros: Would you hand that to the witness.

(The bailiff handed a document to the witness.)

Q. (By Mr. LeGros): Do you wish to refresh your memory from any documents in your possession? On the first page of the document. [72]

A. Well, I'm sure this is the document, yes.

Q. Do you recognize your signatures?

A. Yes, sir.

The Court: Do you wish the record to show that you have shown him an exhibit in this case?

Mr. LeGros: No, your Honor. That is the only copy that I understand the joint venture—

The Court: It is not an exhibit that you have shown him; you have shown him something else, is that what you indicate?

Mr. LeGros: I've given him a record of his own to refresh his memory from, your Honor.

The Court: It is not referred to in the record by any number, so we do not know and never could

(Testimony of Loren Ellsworth Baldwin.)
know in the future whether what he refers to is now or ever will be in the future in the record.

You may proceed.

Mr. LeGros: I'll ask the clerk to mark that.

The Clerk: It will be marked Plaintiff's 9.

(Joint Venture Agreement was marked Plaintiff's Exhibit No. 9 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked Plaintiff's Exhibit 9, can you tell me what that instrument is?

A. This is the joint venture agreement between [73] the three companies participating in the contract known as 826.

Q. Now, by referring to that instrument can you refresh your recollection as to the date of its execution?

A. Well, the agreement was drafted on the 14th day of June.

Q. 1955?

A. 1955. The signatures, I don't know when they were put on, the date of those.

Q. Now, as to this joint venture that you were engaged in with the Anderson Construction Company and Montin-Benson Company along with your own company of Islands Construction Company, would it be proper to state that all obligations under the contract and all liabilities assumed under the contract,—I'm referring now to the Ladd-Elmendorf Air Force Base project,—are assumed on a joint and several basis?

A. Not exactly, sir. There's the physical and the

(Testimony of Loren Ellsworth Baldwin.)

business part of the contract. By the physical part of the contract I mean the outside management, was more or less empowered in the Islands Construction Company, and the business management, such as the purchase of insurance and bonds and business agreements, was vested in Martin Anderson and L. E. Baldwin.

Q. You two had complete authority for the management of the joint venture?

A. That's so. [74]

Q. And does the joint venture spell out the respective interests of the various parties, does the agreement? A. I'm sure it does, sir.

Q. And that is on the 50/25/25 basis that has been heretofore testified to?

A. Yes, sir. Yes, it's on Page 2.

Q. And does the agreement provide that all insurance and bonds which the joint venture may be required to furnish and the costs thereof are to be charged to and paid by the joint venture?

A. Well, I didn't read this document this morning, but—and I can't answer that question without reading the document.

Q. Well,—

A. If you want to give me time to read it, I'll be glad to.

Q. Referring to Paragraph IX. I'm trying to— A. Yes, that's spelled out very—

Q. It's very clearly spelled out, is it not?

A. Yes, sir.

Q. And does the document also provide that the

(Testimony of Loren Ellsworth Baldwin.) commissions on bonds and insurance premiums purchased by the joint venturers shall be divided between agents and brokers designated by each of the parties in proportion of the respective percentage of each party in the contract for said project? [75]

A. Yes, sir.

Q. In other words, Mr. Baldwin, that allows for the appointment of an agent outside of Seattle such as Ancel Earp to participate in this insurance and bonding of this corporation?

A. Well, there was no discussion on that. I wouldn't answer that question yes because generally a joint venture may include joint underwriters and I might want to use one insurance company and my joint venturers, the other two, and it wouldn't be with the same company at all, and it was my own personal interpretation of that paragraph that we could use whom we wished as far as bonding or insurance was concerned up to that percentage.

Q. Then any one of you could allot the bonding or insurance up to his percentage to his own designated broker? A. I would say yes.

Q. Now, does the contract also provide in Paragraph II as to all obligations of the contractor under the said contract as may be concurred in by the joint venture, and all liability assumed against any of the joint venturers as contractor, principal or indemnitor, in connection with any application made for, or the issuance of, any surety bond, shall be participated in on the following percentages,

(Testimony of Loren Ellsworth Baldwin.) [76] and then designating your respective percentages?

A. That's true.

Q. So isn't it the construction of this contract, Mr. Baldwin, that you are interested in this lawsuit up to the extent of fifty per cent?

A. I'm not being sued.

Q. No, but if a judgment is rendered against Mr. Anderson he can call upon you for a contribution up to fifty per cent, your share?

Mr. Simon: I object to that as calling for a conclusion of law.

The Court: The objection is overruled.

Q. (By Mr. LeGros): Isn't that the clear purport of that language? A. I would say yes.

Mr. LeGros: I have no further questions of this witness.

The Court: Having in mind the possibility of the defendant calling this witness later as its own witness, you may nevertheless examine further, if you wish, concerning any matter that was asked on direct examination, or an further direct examination.

Mr. Simon: May it please the Court, reserving the right, of course, to call Mr. Baldwin later as a part of our case, I should like to ask only one [77] or two questions regarding these matters that were brought out.

The Court: You may do that. That right is entirely reserved to Counsel.

(Testimony of Loren Ellsworth Baldwin.)

Cross Examination

Q. (By Mr. Simon): Mr. LeGros asked you, Mr. Baldwin, whether at the time these two checks which you identified yesterday which are Plaintiff's Exhibit 5 were sent to McCollister & Company there was any discussion between you and Mr. Anderson with reference to that.

A. That's true.

Q. And I believe you answered that there had been. A. That's right.

Q. Will you please tell us what that discussion was?

A. Well, do you want any background, or do you just want—

Q. Just what he said to you and what you said to him.

A. Well, the invoice came in and it was approved for payment by our office. The check was drafted and brought in for my signature. Inasmuch as the rate had been in dispute on the bond, I called up Martin Anderson and I asked Mr. Anderson, "Do you want this invoice paid?" He said, "There's no objection to paying the first invoice. I'm sure that we'll have a corrected invoice at a later date," and he said, "We shouldn't hold it up." [78] The second check, when it went out, went out under similar circumstances. It was held up a few days because I believe Mr. Anderson was out of town, but there was discussion with Mr. Anderson before any check went out on insurance or bonds.

(Testimony of Loren Ellsworth Baldwin.)

Mr. Simon: May the witness be shown Defendant's Exhibit A-1, please.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): Defendant's Exhibit A-1 has been admitted into evidence and is a letter of McCollister & Company to your company regarding the payment of a premium on these bonds?

A. Yes.

Q. It bears notations showing that—well, first, does that letter say in substance——

The Court: Is it in evidence?

Mr. Simon: Yes, your Honor.

The Court: Very well, you may proceed.

Q. (By Mr. Simon): —that the bond premium as shown by invoice of September 1st is thirty-five thousand plus dollars and that it was understood that that would be paid in three installments?

A. That's what this letter says, yes, sir.

Q. And I'll ask you whether there are notations on that letter at the bottom, some dates and amounts? [79]

A. Yes, there are.

Q. Were those notations put on that letter in your office.

A. Not in my office. I imagine in Mr. Oja's office, our accountant.

Q. Well, I mean Islands Construction Company's office. A. Yes.

Q. And I'll ask you whether those notations indicate that on the dates there specified the two of

(Testimony of Loren Ellsworth Baldwin.)
those installments called for by that letter were paid, the amounts being given? A. That is so.

Mr. Simon: That's all from this witness at this time.

The Court: Anything further?

Redirect Examination

Q. (By Mr. LeGros): Mr. Baldwin, that letter makes no reference to the one-quarter that was billed through Ancel Earp of Oklahoma City, does it? A. No, sir.

Q. It merely refers to the September 1st, 1955, statement? A. Yes, sir.

Q. And that statement contained a complete itemization of this account, did it not? [80]

A. I would say we would understand it. It's not itemized, however.

Q. You understood it, however? A. Yes.

Mr. LeGros: That's all.

The Court: Anything further?

Recross Examination

Q. (By Mr. Simon): Mr. Baldwin, had you ever heard of Ancel Earp at the time of the signing of these checks?

A. I was very surprised when I even knew there was such a name. No, we had never had any notice.

Mr. Simon: That's all.

Mr. LeGros: That's all.

The Court: You may step down.

(Witness excused.)

The Court: Call the plaintiff's next witness.

Mr. LeGros: Has Mr. Simon's witness arrived, your Honor?

Mr. Simon: If the Court please, if Counsel has no objection I should like to impose upon the stipulation to call a witness.

Mr. LeGros: Yes, just so the record indicates that this is a part of Mr. Simon's case in chief.

Mr. Simon: Yes, we interrupt Counsel's case with this portion of our own case by reason of his courtesy and the Court's indulgence.

The Court: That request to so interrupt is granted, and this witness will now be sworn as a witness on behalf of the defendant called as a part of the defendant's case in chief with like effect as if the plaintiff had already rested its case in chief, which the plaintiff has not yet done.

KARL K. KATZ

called as a witness by defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simon): Your name is Karl K. Katz, K-a-t-z? A. Yes, sir.

Q. You live in Seattle, Mr. Katz?

A. Yes, sir.

Q. How long have you live in the City of Seattle? A. Since about 1921.

Q. And Mr. Katz, during the year 1955 were you employed by the Montin-Benson Corporation?

(Testimony of Karl K. Katz.)

A. Yes, sir.

Q. And in what capacity? [82]

A. More or less as office manager.

Q. Were you stationed in the City of Seattle?

A. Yes, sir.

Q. Mr. Katz, you have recently been quite ill?

A. Correct. That's right, sir.

Mr. Simon: Will the bailiff please hand to Mr. Katz Plaintiff's Exhibit 1.

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): Mr. Katz, handing you what has been admitted into evidence as Plaintiff's Exhibit 1 in this case, a form of application for a bond—

Mr. LeGros: If the Court please, that document has not been admitted.

Mr. Simon: Oh.

Mr. LeGros: I made the motion and Mr. Simon objected to it.

Mr. Simon: I see.

Q. (By Mr. Simon): Handing you what has been identified as Plaintiff's Exhibit 1, Mr. Katz, marked for identification as Plaintiff's Exhibit 1, I'll ask you whether on the third page of that instrument a purported signature, Karl K. Katz, is your signature? A. It is.

Q. Mr. Katz, I'll ask you whether at the time [83] you signed, placed your signature on that instrument, the figures on that page toward the top of the page in typewriting, forty-seven thousand

(Testimony of Karl K. Katz.)

and some dollars, were inserted, had been inserted in the space where they now appear?

A. No, sir, it was blank.

Q. I'll ask you also whether at the time you signed this document Mr. Martin Anderson's signature appeared on the document?

A. Yes, sir, it did.

Mr. Simon: That's all.

The Court: Will you read the number of that exhibit for identification?

A. 4093.

The Court: Down below.

The Clerk: 1, your Honor.

The Witness: 1.

The Court: You may proceed.

Mr. LeGros: Are you through, Counsel?

Mr. Simon: Yes.

Cross Examination

Q. (By Mr. LeGros): Mr. Katz, could you tell me what date it was that this document was signed?

A. All I could say is I presume it was on the [84] date shown there, June 3rd, but I couldn't swear to that.

Q. That's your best recollection?

A. About then, yes.

Q. With your knowledge of the joint venture, the activities upon which they were engaged and the—

The Court: You have to depend upon your hope that the reporter will put a question mark after

(Testimony of Karl K. Katz.)

your statement. Will you put your statement in the form of a question?

Mr. LeGros: I hadn't completed it yet, your Honor.

The Court: It looked very much like you were not going to in that respect. Do so, will you please.

Q. (By Mr. LeGros): From your familiarity with the joint venture and from your familiarity with the activities leading up to the organization of the joint venture and the preparation of the bids and bonds in this case, it is your best recollection then that this document was signed on or about June 3rd, 1955?

A. I would say on or about, yes.

Q. When the document came to you, Mr. Katz, did you examine it in detail?

A. No, sir. It came to me for the purpose of attesting Mr. Montin's signature.

Q. That was your only concern with it? [85]

A. That's right.

Q. You didn't read the document?

A. No, sir.

Q. And you can state at this time, approximately two years later, that that one blank was left unfilled at the time of signature?

A. The general practice while I was—

Q. Not general practice; I'm directing your attention to this specific document.

A. No, I—I would say that it wasn't filled in, because I had seen many previous ones not filled in.

(Testimony of Karl K. Katz.)

Q. You had not seen many previous ones filled in? A. That's right.

Q. Would you say it was the usual practice to fill these applications in blank?

A. That's right.

Q. That's done throughout the industry so far as you know? A. I couldn't answer that.

Q. Mr. Katz, I'll ask you if any of the typewritten portion on the front of Exhibit 1 was filled in at the time you received this document?

A. I couldn't truthfully answer that because it usually came to me in this shape.

Q. You just look at that one page?

A. Yes, sir, just to attest Mr. Montin's signature. [86]

Q. Was any of the typewritten portion which appears at the bottom of the page inserted at that time, or was the whole page blank?

A. The names of the construction companies involved were inserted, yes.

Q. They were typed in? A. Yes.

Q. They had to be from the way Mr. Montin wrote over them, did they not?

A. That's right.

Mr. LeGros: I have no further questions at this time.

Redirect Examination

Q. (By Mr. Simon): Mr. Katz, have you any independent recollection at all as to the date on which this instrument was signed? A. No, sir.

Q. Your statement to Counsel was based en-

(Testimony of Karl K. Katz.)

tirely upon the date that appears on the instrument? A. Yes, sir.

Q. Do you recall independently when it was that this job, when the joint venturers in this job submitted their bid?

A. No, sir, I wouldn't necessarily be familiar with that at all. [87]

Mr. Simon: That's all.

Mr. LeGros: I'd like to call Mr. Katz now as an adverse witness.

The Court: Wait just a minute. Have you finished your cross examination of Mr. Katz in connection with the direct examination by Mr. Simon?

Mr. LeGros: Yes, your Honor.

The Court: Does Mr. Simon excuse the witness as far as the defendant's case in chief is concerned?

Mr. Simon: I do, your Honor.

The Court: Then that interruption is now ended. We now resume the taking of testimony as a part of the plaintiff's case in chief which was temporarily interrupted for the purpose of the defendant's calling Mr. Katz as a defendant's witness. The plaintiff's case in chief is now resumed and you may call, which I understand you are now doing, this witness as an adverse witness for the plaintiff. Is that right?

Mr. LeGros: Yes, your Honor.

The Court: Let the record show that. [88]

KARL K. KATZ

recalled as an adverse witness by plaintiff, being

(Testimony of Karl K. Katz.)

previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. LeGros): Mr. Katz, you are a corporate official of the Montin-Benson Construction Company, are you not?

The Court: The witness has already been sworn.

The Clerk: Do you want these separate or together?

Mr. LeGros: They can be marked together.

The Clerk: It will be Plaintiff's Exhibit No. 10.

(Copies of payment bond and performance bond were marked Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. LeGros): The question was, Mr. Katz, are you not or were you not at the time of this transaction in May and June of 1955 a corporate official of the Montin-Benson Corporation?

A. Assistant secretary.

Q. Assistant secretary? A. Yes.

Q. And it was in that capacity that you acted [89] in dealing with the various documents which you have signed in connection with the joint venture?

A. The only thing I had to do with any of these documents was such as in this case, attesting Mr. Montin's signature.

Q. Mr. Katz, are you familiar with the broker or insurance agent that the Montin-Benson Corporation uses on its operations?

(Testimony of Karl K. Katz.)

A. I don't quite understand your question, "familiar".

Q. Do you know who it is? A. Yes, I do.

Q. And who is that, please?

A. McCollister & Company.

Q. Did they at any time ever use Ancel Earp in Oklahoma? A. Yes.

Q. He is their regular broker, is he not?

A. That is correct.

Q. And has the Montin-Benson Corporation in its operations in this area channeled its business through the Ancel Earp Company?

A. Not to my recollection.

Q. Pardon me?

A. Not to my recollection. It's usually been done locally.

Q. Directing your attention to the Ladd Air Force-Elmendorf Base job, was that business channeled through Ancel Earp? [90]

A. I wouldn't be—what job again please, sir?

Q. The Ladd Air Force Base.

A. Well, there were several. Which one?

Q. This is the Ladd Air Force Base-Elmendorf job which was the subject matter of the joint venture. A. Of this joint venture?

Q. Yes. A. And your question was—?

Q. Was part of that bond business channeled through Ancel Earp?

A. I would have no knowledge of that.

Q. You don't have any knowledge of that?

A. No, sir.

(Testimony of Karl K. Katz.)

Q. Now directing your attention to the documents which have been given to you, Plaintiff's Exhibit 10, do you recognize your signature on the documents? A. Yes, sir.

Q. Do you recognize the signature of Mr. Montin? A. Yes, sir.

Q. And what are those documents, please?

A. Payment bond and performance bond.

Mr. LeGros: I'll offer the Plaintiff's Exhibit 10.

Mr. Simon: If the Court please, I have only the objection heretofore made. [91]

The Court: You offer it for the same purpose as the last exhibit?

Mr. LeGros: Yes, your Honor.

The Court: It is admitted, the objection being overruled.

(Plaintiff's Exhibit No. 10 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to the reverse side of the payment bond, does that show a premium amount? A. No.

Q. What does it state?

The Court: Are you still referring to Plaintiff's Exhibit 10?

Mr. LeGros: Still referring to Plaintiff's Exhibit 10, the payment bond.

A. (Reading) "Premium included in charge"—

Q. (By Mr. LeGros): Pardon me. There's a little competition out here.

A. Pardon me, sir.

(Testimony of Karl K. Katz.)

The Court: Now would you kindly repeat the statement you were interrupted in.

A. You mean what this—

The Court: Just what you were doing, just resume from what you last started to say and did not [92] because of the noise.

A. Printed on the form is "Total amount of premium charged", a blank, and then inserted in there is "Premium included in charge for performance bond".

Q. (By Mr. LeGros): All right. Now directing your attention to the performance bond and the reverse side of that instrument, still in Exhibit 10, does that have a premium amount inserted in the blank? A. Yes, it does.

Q. And what is the amount, please?

A. \$47,755.72 (sic).

Q. All right. Does your signature appear directly below that in the certificate as to corporate principal? A. Yes, sir, it does.

Q. And in that certificate you attest to the office of Mr. Montin? A. Yes.

Q. I'll ask you if that amount of \$47,753.72 was on that document at the time you affixed your signature thereto? A. No, sir, it was not.

Q. It wasn't? A. No.

Q. Are you sure of that? A. Quite.

Q. Do you know what happened to that [93] document after it left your hands? A. No, sir.

Q. Do you know if it was delivered to Mr. Baldwin?

(Testimony of Karl K. Katz.)

A. I couldn't swear that it was delivered to Mr. Baldwin, but I assume that it was, yes.

Q. You assume it was delivered through your office to Mr. Baldwin?

A. I have no knowledge of it having been delivered to Mr. Baldwin.

Q. But that's your belief from the practice in your office? A. That's right.

Mr. LeGros: That's all I have.

The Court: Mr. Katz, that Exhibit 10 is called what properly? Look at it and answer.

A. Well, the cause number shown, sir—

The Court: No, no, what kind of a paper is that? What kind of information is contained in that exhibit?

A. Well, it looks to me like a photostatic copy of the payment bond.

The Court: Is there any other kind of bond included in it?

A. There are two really. The second one is—

The Court: Name the two kinds of bonds which you say are included in that exhibit. [94]

A. One is a payment bond and one is a performance bond.

The Court: You may inquire.

Mr. Simon: No questions, your Honor.

The Court: Anything further?

Mr. LeGros: Nothing further.

The Court: Do Counsel desire to excuse the witness permanently?

Mr. LeGros: I understand that Mr. Katz is

(Testimony of John C. Beeson.)

under a doctor's care and I have no wish to detain him.

The Court: Do you make that request?

Mr. Simon: Yes, I make the request that he be permanently excused.

The Court: Mr. Katz, you are permanently excused and may go on about your own affairs with like effect as if you had not been asked to come here.

The Witness: Thank you, sir.

(Witness excused.)

The Court: Call the next plaintiff's witness.

Mr. LeGros: We'll call Mr. J. C. Beeson. [95]

JOHN C. BEESON

called as a witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full, please? A. John C. Beeson.

Q. And where do you reside, Mr. Beeson?

A. 900 University Street.

Q. That's the Baldwin Apartments?

A. That's correct.

Q. Mr. Baldwin is your landlord also?

A. Yes.

Q. Are you married, Mr. Beeson?

A. Yes, I am.

Q. And how long have you resided in the City of Seattle? A. Since about 1926.

(Testimony of John C. Beeson.)

Q. During that time what business have you been engaged in? A. Insurance.

Q. As part of your activity in the insurance field is the soliciting and obtaining of surety bonds one of your activities? A. Right.

Q. In May and June of 1955 with what organization were you associated? [96]

A. McCollister & Company.

Q. And in what type of business was McCollister & Company engaged?

A. General insurance and bonds.

Q. Mr. Beeson, when was it that you first heard of the proposed joint venture of Islands Construction Company, Anderson Construction Company and Montin-Benson Corporation?

A. Well, I couldn't state that exactly but it's customary to know about ten days, a week to ten days ahead of the bids.

Q. And that's the first time you knew that there was this association of firms?

A. That would be right.

Q. And through whom were you advised of this association?

A. Well, it could be either Mr. Baldwin or Mr. Anderson.

Q. You've had long dealings with both of those gentlemen? A. That is right.

The Court: I believe he asked you with whom it was, he did not ask you with whom it might have been or could have been.

A. I couldn't tell you.

(Testimony of John C. Beeson.)

Q. (By Mr. LeGros): It was either one of the two? **A.** That is right.

The Court: Do you ask him that as a question [97] or are you stating to him that as a fact?

Mr. LeGros: I'm asking him as a question.

The Court: Very well. Please let your words and the form of the sentence so indicate.

Q. (By Mr. LeGros): It was either Mr. Baldwin or Mr. Anderson? **A.** That is correct.

Q. Now, Mr. Beeson, at the time that you were advised of this proposed joint venture could you tell me approximately the date that this advice was communicated to you? **A.** No, I could not.

Q. Could you give us an approximation?

A. Well, as I say, it would be a week to ten days before the bids would be opened.

Q. And do you know when the bids were opened in this case? **A.** No, I don't remember.

Q. Would that be in May of 1955?

A. As I recall it was in May, the latter part of May.

Q. The latter part of May of 1955; is that correct, sir? **A.** (Witness nods his head.)

Q. Now, Mr. Beeson, were you advised as to the particular job that this joint venture was interested in? **A.** Yes.

Q. And what was that job, sir? [98]

A. It was various buildings at Ladd and Elmendorf Air Force Bases.

Q. And were you advised as to what the approximate amount would be involved in that operation?

(Testimony of John C. Beeson.)

A. I believe I was.

Q. And what was it, sir?

A. Somewhere under seven million.

Q. And did you participate in a conference with Mr. Anderson and Mr. Baldwin pertaining to that job and their proposed bid?

A. I believe I did several times.

Q. And was the question as to the obtaining of bonds for the joint venture raised with you?

A. That is right.

Q. And what type of bonds was it that they were interested in obtaining?

A. Final payment and performance bonds as well as the bid bond.

Q. And were those the types of bonds that your company was able to obtain for persons engaged in that business? A. That is right.

Q. Now, Mr. Beeson, is the insurance industry in the State of Washington regulated by statute?

A. Yes, it is.

Mr. Simon: That's objected to as irrelevant and immaterial. [99]

The Court: What have you to say?

Mr. LeGros: I asked if the insurance business—

The Court: I know, but what have you to say in response to Counsel's objection?

Mr. LeGros: I think it's a matter of law in this state that the insurance business is regulated, of which the Court can take judicial notice.

The Court: Do you think that is an answer to

(Testimony of John C. Beeson.)

his objection that it is not relevant? I understood you objected on the ground that it was not material.

Mr. Simon: That's right, your Honor.

Mr. LeGros: It's an admitted fact in this case, if the Court please, that certain rates were filed as required by statute with the Insurance Commissioner, and it's pertaining to approach that subject that I'm asking this preliminary question.

The Court: The objection——

Mr. Simon: If the Court please, our objection goes to the requirement of the filing of those rates as being irrelevant and immaterial. The fact that the rates quoted had also been filed, I haven't any objection to an inquiry as to the rates that this company quoted and the time when they were [100] charging the rates in question. My objection goes only to the materiality of anything having to do with the requirement of such filing.

Mr. LeGros: If the Court please, I believe that in order to establish the rate we have to first show that the rates were required to be filed, and we will establish that the insurance code provides that anybody writing bonds in this state must file a rate with the Insurance Commissioner.

The Court: The objection is overruled. You may inquire.

Mr. LeGros: Could you read the question, Mr. Reporter.

(The reporter read the last question as follows: "Q. Now, Mr. Beeson, is the insurance

(Testimony of John C. Beeson.)

industry in the State of Washington regulated by statute?"")

A. Yes, it is.

Q. (By Mr. LeGros): And in order for a surety company to quote a bond premium is it necessary that that company have filed with the Insurance Commissioner of the State of Washington a schedule of rates?

Mr. Simon: May it be understood, if the Court please, without the necessity of continued [101] interruption, that the objection I have heretofore made extends to this line of inquiry?

The Court: Do you approve?

Mr. LeGros: Yes, your Honor.

The Court: The Court does, and it will be so understood. Proceed. The same ruling.

Mr. LeGros: Could you repeat the question, Mr. Reporter.

(The reporter read the last question as follows: "Q. And in order for a surety company to quote a bond premium is it necessary that that company have filed with the Insurance Commissioner of the State of Washington a schedule of rates?"")

A. Yes, they must do so.

Q. (By Mr. LeGros): Now, reference has been made heretofore to the so-called board companies. Could you tell us what is meant by the phrase "board companies"?

A. Well, there are a number of companies throughout the United States that subscribe to a

(Testimony of John C. Beeson.)

rating bureau known as the Towner Rating Bureau, and Towner sets these various rates and then the companies file them in the various states that they do business in. [102]

Q. And has the rating bureau, or had the rating bureau filed in the State of Washington a schedule of rates which was applicable to these bonds at the time they were executed?

A. That is right.

The Clerk: It will be marked Plaintiff's Exhibit No. 11.

(A rate page from Towner Rating Bureau manual was marked Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked as Exhibit No. 11, could you tell me what that is, please?

A. This is a rate page taken from the Towner Rating Company's manual.

Q. And could you tell me if that is the rate that was in effect in the State of Washington for this type of bond in May and June of 1955?

A. It was in effect at that time.

Mr. LeGros: I will offer Plaintiff's Exhibit 11.

Mr. Simon: I understand that my objection extends to this line of inquiry.

The Court: Is this particular exhibit offered for the purpose previously mentioned?

Mr. LeGros: Yes, your Honor. [103]

The Court: And/or any other?

Mr. LeGros: Yes, your Honor, and this exhibit

(Testimony of John C. Beeson.)

has been admitted specifically in the pretrial order.

The Court: Subject to what conditions?

Mr. LeGros: Subject only to relevancy and materiality.

The Court: The objection—

Mr. Simon: I am not making any objection on the basis of lack of proper identification.

The Court: I understand that from what he has just said. If you understand differently, you may so state. The objection reserved in the pretrial order is overruled as applied to this particular document. And Plaintiff's Exhibit 11 is now admitted.

(Plaintiff's Exhibit No. 11 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Mr. Beeson,—

The Court: Pardon me. Mr. Beeson, what do you call that Exhibit 11?

A. It's a rate page.

The Court: Rate what?

A. Page.

The Court: Page from what?

A. Towner Rating Company's manual.

The Court: You may proceed. [104]

Q. (By Mr. LeGros): In fixing the premium for a bond, and I'm speaking now of a performance bond or a payment bond in general and not any specific bond, how is that rate determined?

A. It's determined on the type of the work, the amount of the contract and the length of duration of the contract.

Q. And what is the base upon which the bond

(Testimony of John C. Beeson.)

premium is based? In other words, do you take into account the contract price?

A. It is based entirely on the — not entirely. You use the contract price, the type of work and the duration.

Q. And knowing the type of work, the duration and the contract price, you can then compute a bond premium from your manual?

A. You can. There are certain cases where a bond premium is less than fifty per cent and the premium is therefore reduced. There are quite a few factors you take into account.

Q. And Mr. Beeson, directing your attention now to the conference and conferences between Mr. Anderson and Mr. Baldwin preparatory to the execution of bonds, were they able in those preliminary conferences to give you any definite contract price?

A. They might have been able to but I wouldn't ask them for it. [105]

Q. And why was that, sir?

A. Because I wouldn't want to know.

Q. Would that be because it would be related to the bid that they were submitting in competition to other contractors?

A. Which would be confidential to themselves.

Q. And in this case did they indicate to you the amount of their bid?

A. Not that I recall.

Q. And did they ask you as to the rate of bond

(Testimony of John C. Beeson.)

premium that would be charged them for this bond or for the bonds in this case?

A. They might have.

Q. And would your answer have to be an approximation based upon—

A. I would give them the rate on certain amounts of the contract and then they could figure out their own premium.

Q. And was that what was done in this case?

A. If the rate was quoted it would be done that way.

Q. And how would you quote a rate to them?

A. Well, the first two and a half million it would be \$8.00 per thousand contract price. The next two and a half million would be \$7.67. Over that would be \$7.33. They, knowing what they were going to bid, could figure out what the bond premium would cost them.

Q. And so that was the information you gave [106] them in these preliminary conferences?

A. If that was the information they asked for that was the information they received.

Q. And Mr. Beeson, did you at any time indicate to them that you could obtain a bond for them at less than the established rate then in effect as filed with the Insurance Commissioner of the State of Washington.

A. I told them if they wanted to use another company the rate could be cheaper.

Q. You were referring then to what type of company?

(Testimony of John C. Beeson.)

A. What we call the non-Towner companies.

Q. Broadly have those been referred to previously as non-board companies?

A. Well, it's one and the same.

Q. So I take it then that you told them you could obtain a cheaper rate with a non-board company?

A. I didn't have to tell them. They knew that, but I probably told them anyway.

Q. They were very familiar with bonds and bonding rates, were they not?

A. That is correct.

Q. And did they indicate a preference for United States Fidelity & Guaranty Company bonds?

A. They must have, otherwise they wouldn't have been used.

Q. And did you indicate to them in any way [107] whatsoever that you could obtain a United States Fidelity & Guaranty Company bond at a rate less than the rate established by the Towner Rating Bureau as filed with the Insurance Commissioner?

A. I told them that I knew that in the near future those rates were going to be reduced and if the bond was written prior to that time the new rates could be used. They didn't know what the new rates would be nor when they would be approved.

Q. Now let me get this straight, Mr. Beeson. You told them what, again?

(Testimony of John C. Beeson.)

A. I told them that shortly the rates on these Towner companies would be reduced and if they were reduced, or the time they were approved was prior to the time the bonds were written, that reduction would be given to them.

Q. And if the bonds were executed before the reduction what did you indicate?

A. Considerably, as I remember it.

Q. Pardon me?

A. Considerably, as I remember it.

Q. But what did you indicate as to the possibility of getting a reduction?

A. None to my knowledge.

Q. Pardon me? [108]

A. None to my knowledge.

Q. In summary, then, did you tell them that if—

Mr. Simon: Objected to as leading.

The Court: The objection is sustained.

Mr. LeGros: Yes, your Honor.

Q. (By Mr. LeGros): And when were the bonds executed in this case, Mr. Beeson?

A. A performance bond and a payment bond.

Q. And when were they executed?

A. I believe it was the first part of June, but that will show on the bond.

Q. In 1955? A. Yes.

Q. And Mr. Beeson, subsequent to the execution of the bonds was there filed with the Insurance Commissioner a reduction in bond rates?

A. No.

(Testimony of John C. Beeson.)

Q. By the Towner rating system? A. No.

Q. That was after these bonds were executed?

A. That is right.

Q. I'm directing your attention now to July of 1955. Were the bond rates for the non-board companies reduced during that month?

A. Well, they were reduced shortly after the [109] period or the time that the board companies were reduced, but I couldn't say without looking at the manual, give you the exact date.

The Clerk: It will be Plaintiff's Exhibit No. 12.

(A rate page from Towner Rating Bureau manual was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked as Plaintiff's Exhibit 12, could you tell me what that is, Mr. Beeson?

A. Well, this is another page from the Towner rating manual.

Q. And what is the effective date of that rating?

A. July 20, 1955.

Q. And is that the change in rate schedules that you had reference to? A. That is right.

Mr. LeGros: I will offer Plaintiff's 12.

The Court: Plaintiff's Exhibit 12 is now admitted.

(Plaintiff's Exhibit No. 12 for identification was admitted in evidence.)

The Court: What do you call that, Mr. Beeson?

A. It's a rate page from the Towner rating manual. [110]

(Testimony of John C. Beeson.)

The Court: At this time we will take the noon recess until two o'clock this afternoon. The jury will now retire subject to the Court's previous admonitions.

I cannot tell you finally, I do not believe now that this case will go to the jury today. I cannot tell you finally. What I say is not controlling of what will happen, but that is my present belief. It may be changed by later developments.

The jury may now retire for the noon hour.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 2:00 o'clock p.m.) [111]

Wednesday, May 15, 1957
2:00 O'Clock P.M.

(All parties present as before.)

The Court: Unless Counsel have a different request I would suggest you bring in the jury.

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. You may proceed. The witness has returned to the stand for further interrogation.

Q. (By Mr. LeGros): Mr. Beeson, you have stated that you had heard in May that the board companies were considering a reduction in rates. That is true, is it not?

A. It was either in May or prior to that.

Q. Did you know at that time the extent of the reduction? A. No.

(Testimony of John C. Beeson.)

Q. Did you know that there would in fact be a reduction of any substantial amount?

A. Well, only I felt that if there wasn't a substantial amount there was no point in making one.

Q. When was it that the actual reduction was known to the trade?

A. Sometime in the middle part of July.

Q. In July? [112]

A. Yes. It's on that rate page you gave me a while ago.

Q. Yes. Now, Mr.—

The Court: Do you think that was Plaintiff's 12 or Plaintiff's 11 that you had in mind in making your last remark?

A. It would be on the white page, temporary one.

The Court: Let the witness have both those last two exhibits and let him say what he had in mind.

(The exhibits were handed to the witness.)

The Witness: Exhibit 12.

Q. (By Mr. LeGros): Plaintiff's 12?

A. Yes.

Q. And that's the first time you knew what the rate would be? A. That is correct.

Q. Now, Mr. Beeson, handing to you what has been marked for identification as Plaintiff's Exhibit 1, could you tell us what that is, please?

A. This is a contract bond application.

Q. And do you recognize the signatures affixed to that application? A. Yes, I do.

Q. And who are they, please?

(Testimony of John C. Beeson.)

A. Martin Anderson, Vern J. Oja, William V. Montin and Karl K. Katz. [113]

Q. Are the first three mentioned three representatives of the joint venture with which we are here concerned? A. That is right.

Q. Now, Mr. Beeson, directing your attention to the material on the bond which is contained by typewriting rather than the printed form, could you tell me where and by whom that information was placed on that document?

A. You mean who typed it?

Q. Not typed it; in what office?

A. Well, it would be in McCollister & Company's office.

Q. And could you tell me about the approximate time that that bond application form was drawn up?

A. Either June 3rd or shortly thereafter.

Q. And could you tell me if all the typewritten material was placed upon the bond at the same time? A. No, I couldn't.

Q. Pardon me? A. No, I couldn't.

Q. Would it be around the approximate time that you have mentioned?

A. Well, if it wasn't on the application when it left McCollister's office it would have been placed on there when it was returned, which I would imagine wouldn't take over a week or ten days.

Q. Now directing your attention to the third page of the application form, do you find figures inserted in a space left for the insertion of figures?

(Testimony of John C. Beeson.)

A. I do.

Q. Could you tell me, Mr. Beeson, whether to your knowledge those figures were on the bond application when it left your office and went to the members of the joint venture?

A. It would not necessarily have to have been. It might have been, it might not have been.

Q. In preparing bond applications for bonds of this magnitude what is the usual practice in your office?

A. The usual practice would have been to have had the bond premium inserted.

Q. A great number of bonds, however, are written, are they not, Mr. Beeson, on bond applications which are signed and where nothing is inserted?

A. That is correct, especially where they use an application both for the bid bond and the final bonds.

Q. Yes. And Mr. Beeson, directing your attention further to the printed material on Page 3 of the bond and specifically the ninth provision which forms a part of this agreement—

A. That's customary. You'll find that in all bond applications.

Q. And by the terms of that provision is the [115] bonding company given the right and privilege to fill in any blanks left?

A. Or correct any errors.

Q. And any such notation that they made is *prima facie* correct, is it not, by the terms of the provision?

(Testimony of John C. Beeson.)

A. Well, so far as I know it would be.

Q. That's what the agreement provides for, is it not? A. Yes.

Q. Pardon me? A. Yes, it does.

Q. Now, directing your attention to the face of the bond, there is certain material there which is in pen and ink. Could you tell me in whose handwriting that information is?

A. Mr. Don Roger's.

Q. And who is he, please?

A. He is the surety manager of McCollister & Company at the present time.

Q. And directing your attention to Page 2 of the bond application, in whose handwriting is that information? A. That is my handwriting.

Q. Now,—

Mr. LeGros: I will renew my offer as to Exhibit 1.

Mr. Simon: I renew the objection, if the Court please. [116]

The Court: I wish to hear from Counsel on that in the absence of the jury at the earliest opportunity. You may proceed.

Q. (By Mr. LeGros): Now, Mr. Beeson, the application on its face contains the contract price figure of \$6,170,357.00. Is that the base upon which the bond premium was computed at the rates then in effect? A. Yes, sir.

Q. And on that computation what is the bond premium for these bonds? A. \$47,753.72.

(Testimony of John C. Beeson.)

Q. And is that the only rate that could be charged for bonds of that size at that time?

Mr. Simon: Objected to.

A. Well,—

The Court: Just a minute.

Q. (By Mr. LeGros): Under the rating schedule as filed?

Mr. Simon: If he means by that was that the rating schedule rate according to the rating schedule that he has testified about, I think it's repetitious. If he means by that that any contract for a different rate is illegal, I submit that it's improper.

The Court: Do you care to clarify your question?

Mr. LeGros: Your Honor, I asked—— [117]

The Court: In view of the objection, because I think the last part of the objection is well taken.

Mr. LeGros: The question was whether or not that was the bond premium which is the result of a mathematical computation on the basis of the rate schedule then in effect.

Mr. Simon: I have no objection to that.

The Court: That is not what he said. Read what he said, Mr. Reporter. That is not what I heard him say. Maybe the reporter has it differently.

(The reporter read the question back as follows: “Q. And is that the only rate that could be charged for bonds of that size at that time?””)

Mr. LeGros: Then I added something to it. Will you read the addition.

(Testimony of John C. Beeson.)

(The reporter read back further as follows:

"Q. Under the rating schedule as filed?"

Mr. Simon: I object upon the grounds stated.

The Court: The objection is sustained. You may have the opportunity of restating or clarifying your question or stating more clearly the question.

Q. (By Mr. LeGros): Under the rating [118] schedule as filed, Mr. Beeson, with the Insurance Commissioner of the State of Washington, and on a contract of \$6,170,357, and with the parties seeking the bond being the members of the present joint venture, and a bond written in a so-called board company, and on the basis of the rating schedule then on file, what would the bond premium be?

Mr. Simon: Objected to as repetitious.

The Court: The objection is overruled.

A. The bond premium would be \$47,753.72.

Q. (By Mr. LeGros): Mr. Beeson, handing to you what have been marked as Plaintiff's Exhibits 2, 3, 7 and 10, would you tell me if you know what those documents are?

A. Well, Exhibit 2, Exhibit 3, Exhibit 7 and Exhibit 10 are all copies of performance and payment bonds.

Q. And where were those bonds prepared, Mr. Beeson?

A. They were prepared in the office of McColister & Company.

Q. And when those bonds were prepared by McColister & Company was the amount of pre-

(Testimony of John C. Beeson.)

mium as shown on the reverse side of three of the bonds inserted at that time?

A. Well, when a performance bond or payment bond is written and leaves their office, the premium is always in place.

The Court: No, that does not answer the question.

Q. (By Mr. LeGros): Was it on this occasion?

The Court: If you know. [119]

A. Well, I know it was because they don't let performance bonds out of the office without a premium on them.

Q. (By Mr. LeGros): And why is that, Mr. Beeson?

A. Because it's a Government rule.

Q. In other words, you're complying with a mandate of the United States Government?

A. That is right.

Mr. Simon: Objected to as not the best evidence.

The Court: That objection is overruled.

Q. (By Mr. LeGros): And why is that, Mr. Beeson?

A. Well, the Government checks these bond premiums.

Q. Do they check them to correspond with the rating schedule? A. That is right.

Q. And that is why the bond — the Government —

The Court: Just a minute. This is direct examination of your own witness. Do not lead him. Proceed.

(Testimony of John C. Beeson.)

Q. (By Mr. LeGros): After the bonds were prepared in your office what happened to them?

A. They would be delivered to the contractor.

Q. And what would the contractor do with them?

A. He would complete the bond and forward it to the contracting officer.

Q. Did you see these bonds again after they left your office? [120]

A. Not to my knowledge.

Q. Now, Mr. Beeson, after the bonds were executed—

Mr. LeGros: I'll withdraw that question. You may examine, Counsel.

Cross Examination

Q. (By Mr. Simon): Mr. Beeson, have you any independent recollection as to who typed these performance and payment bonds of which Exhibits 2, 3, 7 and 10 are copies?

A. Not any independent recollection, but if you could check the records of McCollister & Company and see who my bond girl was at that time you could find out.

Q. Your answer is that you do not have any independent recollection? A. No, I don't.

Q. Do you have any independent recollection of who took the bonds to be signed, if anybody did?

A. As a rule it would have been myself. If I had not been around it probably would have been Mr. Rogers.

(Testimony of John C. Beeson.)

Mr. Simon: Will you please read the question to the witness?

The Court: Read it. Have in mind the particular form of the question, Mr. Beeson. It saves time.

(The reporter read the last question.) [121]

A. No.

Q. (By Mr. Simon): Now, do you have any independent recollection whether in this particular case there was the same form of application used for the bid bond as for the performance and payment bonds? A. No.

Q. I'll ask you whether it wasn't the usual custom when you knew of a case of this sort coming up to get the signature of the applicants on the form of application as soon as you could?

A. That is correct.

Q. And that form of application at that time would be treated as an application for a bid bond?

A. Right.

Q. And the same form would serve as an application for the performance and payment bonds?

A. It could, sir, yes.

Q. As I understand it, when a contractor—when you persuaded the contractor to get a bond by the application of—by the signing of this form for a bid bond in the first place, then later used that same application which he had already signed as his application for a performance and payment bond, there were necessarily a good many things that had to be filled in which were not available at the time of the application for the bid bond;

(Testimony of John C. Beeson.)

isn't that right? [122] A. That's right.

Q. And one of those things was the amount of the premium?

A. Well, in an application for a bid bond we only have a five dollar premium. The final premium could not be ascertained until we found out what the bid price was.

Q. I say if you subsequently filled in this information on the same form that had been submitted, as you have said was commonly done, the amount of the premium for the performance and payment bonds couldn't have been inserted at the time of the signing of that application by the contractor?

A. You say could not have?

Q. Could not have. A. That's right.

Q. Because the amount of the performance and bid bond premiums was dependent on the amount of and the duration of the contract which it was supposed to guarantee, wasn't it?

A. On the performance bond but not on the bid bond.

Q. No, but on the perform—the bid bond you could insert "\$5.00" or whatever was essential?

A. That's true.

Q. But on the performance or payment bonds the amount of the premium on those was dependent [123] or two, or at least one thing that couldn't be ascertained at the time of the submission of the bid bond? A. That's right.

Q. And that was the amount of the award, of the contract award, isn't that true?

(Testimony of John C. Beeson.)

A. That's true.

Q. And under government regulations a contractor who desired to bid on a contract was required to accompany his bid with a bid bond, and the condition of that bond was that if he were awarded the contract he would go through and execute the contract? A. Right.

Q. And then after such a contractor if he were successful was notified that he was the successful bidder, he would be sent a form or forms of contract for signature and be required to furnish performance and payment bonds, isn't that right?

A. That's true in some cases.

Q. Well, in this particular case that was true, was it not?

A. Well, I think that you'll find that they had to submit the bonds before they got the contracts.

Q. Well, to refresh your recollection isn't it a fact that the signed contracts and the performance and bid bonds were submitted to Alaska, I mean to the U. S. Engineers in Alaska with the same covering letter? [124]

A. That could be. I didn't see that covering letter.

Q. I see. And the notice to proceed would follow the receipt of both the signed copies of the contract and the performance and payment bonds?

A. That's customary.

Q. Now, what government regulation requires the insertion of the premium, the amount of the premium on these bonds?

(Testimony of John C. Beeson.)

A. That I couldn't tell you, what the number of it is. You just have to fill out the necessary spaces on the bond, and that is included as part of it.

Q. These bond forms are prepared by the government? A. That is correct.

Q. And you assume from the fact that there was on the back of this bond a recital that the premium on it was blank dollars, that that was a government requirement?

A. That's not an assumption. I know that.

Q. Have you ever had it investigated by some accounting officer?

A. Yes, I've had that happen many times, have them come back and say that the wrong premium was charged or the wrong rate was.

Q. Was that on a cost plus contract or a lump sum contract, or do you know?

A. All ours were on lump sum contracts.

Q. Now, on this matter of the premiums, the non-board [125] companies have premium schedules too, do they not? A. Yes, they do.

Q. And a non-board company bond would be acceptable in a situation like this?

A. Absolutely.

Q. And as a matter of fact you have in times past supplied to some of the men involved in this joint venture—

A. To some of them, yes.

Q. Let me finish. —performance and payment

(Testimony of John C. Beeson.)

bonds on which non-board companies have been the surety? A. That is right.

Q. And specifically you have heretofore supplied for Mr. Loren Baldwin's company performance and bid bonds on which United Pacific was the surety? A. I have.

Q. And that was a non-board company?

A. Right.

Q. And the bond was accepted by the government? A. Yes.

Q. And the premium rate that appeared on those bonds was substantially below the premium rate which this Townsend — Town — Towner rate prescribed for the companies that adhered to that?

A. Yes.

Q. Now, calling your attention to these Exhibits 2, 3, 7 and [126] 10 again, Mr. Beeson, will you please refresh your recollection? They are before you? A. Yes, they are.

Q. They are signed United States Fidelity & Guaranty Company as surety? A. Yes.

Q. By J. C. Beeson? A. Right.

Q. And that is you? A. It is.

Q. And you signed as attorney in fact, is that what it says underneath it? A. Yes.

Q. And you were the attorney in fact of the United States Fidelity & Guaranty Company at the time you signed these bonds? A. I was.

Q. And you were authorized to and did affix the corporate seal of the United States Fidelity & Guaranty Company to those bonds?

(Testimony of John C. Beeson.)

A. Right.

Q. Now, Mr. Beeson, you told Mr. LeGros on his examination this morning that in May and June of 1955 you were associated with McCollister & Company? A. That is right. [127]

Q. How long have you been associated with McCollister & Company? A. Since 1933.

Q. And in what capacity?

A. All the way from office boy to vice president.

Q. And in May and June of 1955 you were the vice president of McCollister & Company?

A. One of them.

Q. Well, as vice president of McCollister & Company did you specialize particularly in this kind of work? A. I did.

Q. And were you the specialist in this field for the company?

A. For McCollister & Company.

Q. Yes, that's what I mean. You were their specialist? A. Yes.

Q. So that when Mr. Loren Baldwin and Mr. Martin Anderson wanted authoritative information about premiums and rates on bonds and insurance they came to you in May of 1955, as they had for some years last past? A. They may have.

Q. Well, as a matter of fact you had similarly at the request of Martin Anderson and at the request of Loren Baldwin executed bonds of like character?

A. Time and again.

Q. Time and again? [128] A. Yes.

Q. And you knew that they regarded you as the

(Testimony of John C. Beeson.)

prime authority on this whole subject, didn't you?

A. Well, as far as McCollister & Company was concerned.

Q. Yes. I mean you were McCollister & Company as far as they were concerned?

A. Well, bondwise.

Q. Yes. And McCollister & Company in turn were general agents, were they not, for United States Fidelity & Guaranty Company?

A. Yes.

Q. And they to your knowledge had been such for many years in this community?

A. Oh, yes.

Q. They were recognized as Mr. U. S. F. & G. in this territory? A. That's correct.

Q. Mr. Beeson, in May and June of 1955 and theretofore did you have stock interest in McCollister & Company? A. I did.

Q. Were you a stockholder? A. Yes.

Q. To what extent did you have stockholdings in McCollister & Company?

A. A minority stockholding. [129]

Q. Well, a substantial one?

A. It was to me.

Q. In the regular course of business of McCollister & Company, when McCollister & Company got an application of this sort for the execution of a bid bond and later on the same application filled it in and used it as an application for a payment and performance bond, as I understand it there was

(Testimony of John C. Beeson.)

no premium, separate premium, charged for the bid bond; am I right?

A. There was a separate premium charged for the bid bond if they were not the successful bidder.

Q. Yes. If they are, if the contractor who gives you this application for a bid bond becomes the successful bidder and you issue to him on this application a performance bond and a payment bond, you don't bill him, I mean you forget about any separate premium for the bid bond?

A. That is correct. If he had been billed for the bid bond he would receive a credit for it.

Q. Now, this business of the rates that you have testified to about the Towner manual, Mr. Beeson, that manual from which two pages have been admitted in evidence here as Plaintiff's Exhibit 11 and Plaintiff's Exhibit 12 is really quite a volume, isn't it? A. Yes, it is. [130]

Q. And you have testified that in your opinion the rates for the kinds of bond here involved are to be found on Plaintiff's Exhibits 11 and 12, which are sheets out of this substantial volume?

A. That's right.

Q. But this business of determining in the volume itself what rates should apply to a given kind of bond and how to compute those rates after you find the kind of bond is a job that requires some expert skill, doesn't it?

A. I don't think it does, no. I was able to do it.

Q. Well, you have been in the insurance business for how many years?

(Testimony of John C. Beeson.)

A. Oh, about twenty in that branch of the business.

Q. Yes, and working with this regularly?

A. Right.

Q. Now, these Towner rates, for instance, distinguished between the rates for bridge bonds and Class A bonds and Class B bonds. Can you tell us offhand what distinguishes Class A bonds from Class B bonds?

A. Well, your Class B bonds are mainly heavy construction such as buildings, dams, work of that sort. Your Class A bonds are highway construction, —there's a hundred different classifications.

Q. In other words, there are various classifications that would come into a different schedule?

A. There are four classifications.

Q. And what are those four classifications?

A. Class A, A-1, B, and supply contracts.

Q. And briefly what are Class A contracts?

A. Oh, a Class A contract would be painting or an REA line, it could be most anything. In fact, there doesn't seem to be any rhyme or reason to it.

Q. And Class A-1?

A. Class A-1 would be something like manufacturing special equipment and supplying it.

Q. And Class B?

A. Class B is your heavy construction.

Q. And Supply?

A. Supply is a straight supply contract where some manufacturer agrees to supply a certain article.

(Testimony of John C. Beeson.)

Q. Now, you say that you've had some discussion with accountants in the government employ in the past about the rate being the proper rate. Would that have arisen because the rate that you applied was say a Class A-1 rate when it should have been a Class A?

A. That's true. Not only that, but also a mathematical error in the computation of the rate.

Q. Only a person with real familiarity with and who was possessed of these schedules would know how to figure these bonds, wouldn't he? [132]

A. He would certainly have to have the schedules.

Q. And they aren't commonly possessed by people generally, are they?

A. No. Usually just the industry; I mean the insurance industry.

Q. And when Mr. Anderson and Mr. Baldwin called you in to ask your advice about these things, you consulted your rate schedules?

A. That is correct.

Q. And they didn't have any? A. No.

Q. And you didn't tell them at any time ever, did you, that— A. Yes, I have.

Q. Now just a minute. I say you didn't tell them at any time ever that these rate schedules had to be on file with the Insurance Commissioner?

A. I don't remember if I ever did or not.

Q. You don't remember ever having told them that? A. That's right.

(Testimony of John C. Beeson.)

Q. Now will you please refer to Plaintiff's Exhibit 12.

(The exhibit was handed to the witness.)

Q. Can you tell from looking at that exhibit when it was filed?

A. It was filed July 20, 1955.

Q. Now, are you sure about that? [133]

A. It's what it says here.

Q. That's all you know about it?

A. That's right.

Q. Isn't it a fact, to refresh your recollection, that those rates were actually filed on July 5, 1955, to become effective July 20, 1955?

A. That I wouldn't know anything about.

Q. You wouldn't know anything about that?

A. No.

Mr. Simon: Do I understand, Counsel, in this connection that the pretrial order herein, Page 4, Paragraph XI, says, "That the document of which copy marked Exhibit b is attached hereto, being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington on the 5th day of July, 1955, for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action, is genuine," and so forth?

Mr. LeGros: I'm relieved to know there's something in this pretrial order that I can agree with you on—that you will agree with me on.

The Court: That is the vice of such a statement

(Testimony of John C. Beeson.)

between Counsel. The Court asks, in view of what Counsel said, do you approve of the statement there in [134] that pretrial order relating to that document?

Mr. LeGros: Yes, your Honor. We are advised by the Insurance Commissioner that the rating bureau filed this rate on July 5th for effect on July 20, 1955.

The Court: You may proceed.

Q. (By Mr. Simon): Mr. Beeson, didn't you know at least as soon as these new rates were filed with the Insurance Commissioner that this was to be the new schedule? A. No, I didn't.

Q. And when you told Mr. Anderson and Mr. Baldwin that the board companies were going to file new rates and that they would be at least competitive with the non-board companies, you were merely guessing?

A. Well, it was a good guess, as it turned out.

Q. Well, didn't you tell them as a matter of fact that you anticipated that this reduction would be as much as 25 per cent?

A. Well, the board—I mean the non-board companies were 25 per cent under the board companies. To meet them it would have to be 25 per cent.

Q. Yes.

The Court: What effect would that have on this premium in dollars and cents if that result took effect?

A. Do you want me to figure it out? I can [135] do it.

(Testimony of John C. Beeson.)

The Court: Can you state substantially?

A. It would be substantially around twelve thousand, plus or minus.

The Court: What balance would that leave over the rated figure you previously have testified to here as to what would be correct?

A. Around thirty-six thousand.

The Court: You may inquire.

Q. (By Mr. Simon): Now, I think you said that Mr. Anderson and Mr. Baldwin were interested in getting the bonds for the lowest price they could. A. Did I say that?

Q. Didn't you? A. I don't remember.

Q. Well, were they? Did they tell you that this was a contract where the competition would be keen and they were anxious to cut all of the overhead as much as they could in order that they could put in a bid that was competitive?

A. They might have told me that. That's true on every job.

Q. Well, you had, I think you've already testified, supplied Mr. Baldwin in times past with performance bonds with United Pacific as surety and on those bonds which were still available the premium would be 25 per cent less [136] than the premium on these board companies?

A. That is right.

Q. And isn't it true that what you said to Mr. Baldwin and to Mr. Anderson upon that occasion was that you were certain that the board companies

(Testimony of John C. Beeson.)

were going to reduce their premiums to be competitive with the non-board premiums?

A. That is right, but I did not know what date that would take effect.

Q. And didn't you tell them that as a consequence there was no use of them going to a non-board company, that if they would give you this application you would see to it that they got the benefit of this new reduced rate?

A. I do not remember saying that.

Q. Well, do I understand you to have testified on your direct examination that you told them that you would get them the benefit of this reduced rate if the rates were reduced before the bonds were delivered?

A. If the rates were reduced before, or became effective, rather, before the bonds were written.

Q. But you told them that if they were not, if the board companies didn't reduce their rates before these bonds were required, that if they signed this application they would have to pay this full 47,000, or the full rate which was 25 per cent more than the non-board rate? [137]

A. They would have to pay the regular board rate effective at that time.

Q. Well, was anything said, Mr. Beeson, to you by either of those gentlemen who were trying to cut down the overhead as to why they would run the risk of the non-reduction of the board rates when they could get the non-board bonds for 25 per cent less and be assured of it?

(Testimony of John C. Beeson.)

A. No. They could have had the non-board bonds.

Q. And isn't it a fact that the reason that they took the board rates rather than the non-board that they could have had for 25 per cent less was because you assured them that you would see to it that if they did they would get the benefit of this reduction?

A. The only assurance I made was that if the reduction was made before the bonds were written they would certainly have the benefit of it.

Q. Will you tell me this, please: What is the relationship between McCollister & Company as the general agency of the U. S. F. & G. with reference to these premiums? I mean to say as I understand it the contractor signs an application for the issuance of a bond by U. S. F. & G. in the normal course?

A. Yes.

Q. And in that form of application there is an agreement [138] to pay a premium, isn't there?

A. That's correct.

Q. Now, actually through the years that premium has not been paid by the contractor to U. S. F. & G.?

A. You mean as far as this Washington district here, Western Washington?

Q. Yes, that's right—no, as far as the jurisdiction of McCollister & Company is concerned.

A. It's paid to McCollister & Company.

Q. It's paid to McCollister & Company?

A. That's right.

(Testimony of John C. Beeson.)

Q. And McCollister & Company collects the premium and McCollister & Company becomes liable to the U. S. F. & G. for what percentage of that premium?

A. Well, the full premium less their commission.

Q. And how much is their commission?

A. That I couldn't say without looking at the contract.

Q. How long were you vice president of McCollister & Company?

A. About two or three years.

Q. In May and June of 1955 how much was the commission that McCollister & Company were entitled to deduct?

A. On that particular type of bond it varied. I couldn't tell you without looking at the contract.

Q. How much of McCollister's commission did you get for originating the business? [139]

A. None.

Q. Were you on a salary? A. Strictly.

Q. Your only interest in the commission was in increased earnings for McCollister & Company of which you were a stockholder and of which you were an officer? A. That's right.

Q. And you can't tell us now how much of a commission McCollister & Company was entitled to on these bonds that they wrote, that you signed and sealed for U. S. F. & G.?

A. I could guess at it.

Q. Well, I don't want a guess. I don't—

(Testimony of John C. Beeson.)

A. It's in the agency contract. It would be very simple to find out from there.

Q. Well, can you tell us any limits? You say that it's different on some contracts than on others.

A. Yes. For instance, the first two and a half million dollars take a certain percentage which I happen to know is 30. The next—

Q. 30 per cent on the first two and a half million? A. Right.

Q. And—

A. The next two and a half million it drops down, I'm not sure whether it's $17\frac{1}{2}$ or $12\frac{1}{2}$, and the next two and [140] a half million the same way.

Q. I see. How low does it drop?

A. Down to five.

Q. Down to five per cent? A. Yes.

Q. But on the first two and a half million 30 per cent of the premium is retained by McCollister & Company as commission?

A. No, not if they have to pay out to an agent.

Q. Well, you were the originating source of this business, weren't you?

A. But that's a general agency.

Q. Well, did they pay out any commission to anybody else on the Martin Anderson bond?

A. No.

Q. So that they got 30 per cent of the premium on the first two and a half million of this bond?

A. For three-quarters of it.

Q. Yes.

A. One quarter would go—

(Testimony of John C. Beeson.)

Q. You're talking now about the fact that Ancel Earp was injected into the situation?

A. That's right.

Q. Do you know how much the total agency commission on this bond which was payable — no, what the total agency [141] commission on this bond was? A. I do not.

Q. Did you ever know? A. Yes, I did.

Q. You've forgotten?

A. You don't keep those things in your mind for two years.

Q. You can't give us a reasonable approximation? A. No.

Q. Now, did you see Mr. Martin Anderson at any time after these bonds were delivered?

A. Many times.

Q. I'll ask you whether it isn't a fact that these bonds were actually delivered on or about the 13th day of June?

A. It's possible. I couldn't tell you one way or the other.

Q. The fact that they were dated the 3rd day of June, if that's the fact, doesn't indicate that that was necessarily the date of delivery?

A. No. The government tells you what date to date the bonds and contracts and you use their date.

Q. You date them back to a preceding date, the date of the award?

A. Well, it's not always the date of the award, but some date the government tells you to do, yes.

Q. Did Mr. Anderson ever complain to you

(Testimony of John C. Beeson.)

about the fact that these bonds were being billed or invoiced to the [142] joint venture at a different rate than had been agreed on between you and him?

A. Well, if he did that, that was a misunderstanding because that was the rate agreed on.

Q. Well, did he ever complain to you that he was being overcharged on the bond rate?

A. He might have.

Q. Well, do you have any independent recollection of that at all? A. No.

Q. "No", did you say? A. No.

Q. I'm sorry, I didn't hear you. Well, don't you recall that Mr. Anderson did complain to you that he was being overcharged and that the rate was higher than you had told him it would be, and isn't it a fact that you told him that you felt sure that something could be done about it?

A. No, that is not a fact.

Q. Did you ever tell either Mr. Anderson or Mr. Baldwin that you felt that this disagreement about the amount of premium due could be adjusted?

A. I told him that we would do the best we could for them, which we did.

Q. But you say you didn't tell him that you thought it [143] could be adjusted?

A. I said I hoped it would be adjusted.

The Court: What adjuster did you have in mind when you said that, if you recall?

A. We went to the home office of the U. S. F. & G. and they took it up with the Towner Rating Bureau. The Towner Rating Bureau said no. So the

(Testimony of John C. Beeson.)

U. S. F. & G. had nothing they could do but say no either.

The Court: You may proceed.

Q. (By Mr. Simon): Did you ever report to the U. S. F. & G. that you had had this oral agreement with Mr. Anderson and Mr. Baldwin that you would see to it that they got the benefit of the reduced rate?

A. If the rate came out and was effective before the bonds were written.

Q. Did you make that in the form of a written report? A. You mean to Baltimore?

Q. Yes. A. No, I don't believe so.

Q. To whom in the U. S. F. & G. organization did you report that you had this oral agreement with Mr.—

A. I did not report that there was any oral agreement. I asked them if there couldn't be some adjustment made.

Q. In asking them that, or when you asked them that did you tell them that you had had this oral agreement with Mr. [144] Baldwin and Mr. Anderson that you would see to it that they got the benefit of the reduced rate?

A. I didn't have that oral agreement.

The Court: I believe the question was did you tell them what was stated in the question.

A. I did not tell them.

Q. (By Mr. Simon): But you did ask that they consider an adjustment?

(Testimony of John C. Beeson.)

A. Either I did ask or someone else in the office did ask.

Q. Because Mr. Anderson and Mr. Baldwin had been misled by something you told them?

A. Just because we thought that they were entitled to the adjustment of the premium, not because they had been misled.

Q. I see. Because they were entitled to the adjustment? A. I thought they were.

Q. Was that because the premium was calculated on a two year term, of which only one month had expired?

A. That had something to do with it.

Mr. Simon: No further questions on cross examination of this witness, your Honor.

The Court: Is there any redirect examination?

Mr. LeGros: I have no redirect.

The Court: You may be excused from the stand.

Mr. LeGros: If the Court please, may Mr. [145] Beeson be excused subject to recall if Mr. Simon wants him? I know he has lots of business to take care of.

Mr. Simon: I have no objection to that, your Honor.

The Court: Mr. Beeson, will you try to make yourself available in case you are called again?

A. Yes.

The Court: Subject to that Mr. Beeson is excused and may go about his business at this time.

(Witness excused.)

The Court: I think we better take the mid-

afternoon recess at this time. The jury will retire to the jury room for about ten minutes, during which time you will have your midafternoon recess. I wish Counsel to remain, if they will, kindly.

(The following proceedings were had without the presence of the jury:)

The Court: I wish to give Counsel an opportunity of further presenting their respective positions regarding this Plaintiff's Exhibit 1. Would you come forward, Mr. Simon? I think we can expedite the matter.

Mr. LeGros: If your Honor please, it is our view that Plaintiff's Exhibit 1 is a written document, it's signed by the parties and they have identified their signatures. There is a question as to the insertion of [146] material. I think that is a matter now for the jury to decide. It is an issue of fact whether or not that was in there at the time or whether it was not.

As a written document I think it has been properly identified and the weight which the jury gives it is now the question.

The Court: I wish you would recount what you think the evidence is in addition to that identifying the execution of it. What do you recall of the testimony as to the other matters at issue respecting that document, that is, whether the words were in there at the time it was signed and delivered?

Mr. LeGros: I think you are now referring to the figures.

The Court: Yes.

Mr. LeGros: Forty-seven thousand some odd

dollars. Mr. Anderson first testified they were not there, subsequently he testified in accordance with his deposition that he didn't know whether they were there. Then the testimony of Mr. Katz was I think rather categorically that they were not there. The testimony of Mr. Beeson was that they perhaps were there and that in the usual custom of his office with a bond of this size they would be there. The testimony of Mr. Montin, which is not yet in evidence, in his deposition is that [147] he doesn't know.

I think that creates a question of fact. As a written document it's complete and unambiguous on its face. The parties have by parol attempted to show what ambiguity, if any there existed, was. I think it has now become a question of fact.

The Court: Mr. Simon, may I hear your statement of what you think the record is now on this question of proper authentication?

Mr. Simon: I think——

The Court: Or lack of proper authentication for admission.

Mr. Simon: I think, if the Court please, that aside from the matter of emphasis, I do not disagree substantially with what Mr. LeGros has said. Mr. Anderson said that as far as this premium was concerned he didn't think it was in there and yesterday, having thought it over, he testified categorically that it was not there. I don't think that that raises any issue. Mr. Katz testified categorically that it was not there, and your Honor has very recently heard the testimony of Mr. Beeson. Mr. Bee-

son said he didn't know whether it was there or not and that it couldn't have been there if this was signed as an application for a bid bond, that customarily when they have an application for a [148] bid bond from a joint venture like this they subsequently filled it out and used it as an application likewise for the performance and payment bonds.

Now, I think that in the light of this ninth paragraph, "That the Company may fill up any blanks left or correct any errors in filling up any blanks herein or in the said foregoing statements, and such insertions or corrections shall be *prima facie correct*," may, coupled with the fact that we did sign this and are presumed to have read it, be sufficient to entitle it to admission, and it is a sufficiently close question so that I don't want to urge the Court to exclude it.

The Court: Aside from the last few words of Mr. Simon's statement the Court is of the opinion that the evidence does show that this exhibit is admissible on the present record. The Court is of the opinion that it should be admitted, and now intends to rule on the offer admitting it upon the return of the jury to the courtroom. If the Court overlooks it temporarily, will you remind me of it?

Mr. LeGros: Yes, your Honor.

The Court: Court is now at recess for at least ten minutes.

Mr. LeGros: Pardon me. May I ask the Court how long you intend to go to? I have just one more [149] witness.

The Court: Is that a deposition?

Mr. LeGros: I have a deposition, but it's short.

The Court: How long will the witness take?

Mr. LeGros: Depending on Mr. Simon's cross examination I'm sure Mr. Friday will be short on direct.

The Court: We will continue to at least 4:30, maybe a few minutes later if by doing so we can finish with the witness then on the stand.

Mr. LeGros: Thank you.

The Court: Court is now at recess.

(Short recess.)

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. The offer of Plaintiff's Exhibit 1 for identification having been further considered, the same is now admitted, the objections thereto being overruled.

(Plaintiff's Exhibit No. 1 for identification was admitted in evidence.)

Mr. LeGros: I would like at this time to call Mr. Nelson Friday.

The Court: Come forward and be sworn as a witness. [150]

NELSON FRIDAY

called as a witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full? A. Nelson Friday.

Q. And you reside where, Mr. Friday?

A. In Seattle.

(Testimony of Nelson Friday.)

Q. Will you give us the street address?

A. 3047 42nd West.

Q. What is your occupation, sir?

A. I'm president of McCollister & Company.

Q. And how long have you been president of that concern? A. Since January, 1955.

Q. Mr. Friday, how long have you been engaged in the insurance and bonding business?

A. I've been engaged in the insurance and bonding business since 1923.

Q. And how many years of that time have been spent with McCollister & Company?

A. Since August of 1949.

Q. Could you state to us whether or not McCollister & Company represents exclusively the United States Fidelity & Guaranty Company? [151]

A. McCollister & Company at the present time represent exclusively the U. S. F. & G. In 19—that's deviating from your answer, but in 19—we have represented other companies. We did not represent U. S. F. & G. exclusively in 1955.

Q. How many companies did you represent in 1955?

A. We represented five companies, or six companies. We represented United States—U. S. F. & G., we represented the General Insurance Company, we represented the United Pacific Casualty Company, we represented the Empire State Insurance Company of Watertown, New York, we represented the Mercury Insurance Company and the Hartford Steam Boiler.

(Testimony of Nelson Friday.)

Mr. LeGros: If the Court please, may the record show that hereafter when we refer to U. S. F. & G. we are referring to the United States Fidelity & Guaranty Company?

The Court: Let the record show that.

Q. (By Mr. LeGros): Now, Mr. Friday, it has been testified to that McCollister & Company is a general agency. Could you tell us how an agency is distinguished from an individual insurance agent?

A. A general agency has the privilege of appointing subagents. In other words, in laymen language the general agency is the wholesaler and as custom in the past had [152] it they used to be wholesalers and retailers. The modern trend of the general agency is to be wholesalers exclusively, within the past several years.

Q. And in 1955, however, McCollister & Company acted as both wholesaler and retailer?

A. In 1955 we acted both as wholesalers and retailers.

Q. Now, Mr. Friday, in your capacity as president of U. S. F. & G. (sic) and your familiarity with the insurance business from your long association with it, are you familiar with the practice of filing rate schedules with the State of Washington?

A. Yes, sir.

Q. And is it necessary for each insurance company writing business in this state in the bond field to file a rate schedule or to have such a rate schedule filed on its behalf?

A. It is, sir.

(Testimony of Nelson Friday.)

Mr. Simon: That's objected to as irrelevant and immaterial, if the Court please.

The Court: The objection is overruled.

Mr. Simon: May we have our preceding stipulation to avoid interrupting?

The Court: A continuing objection?

Mr. Simon: Yes, your Honor.

The Court: You may have that. [153]

Mr. LeGros: That's quite agreeable.

The Court: You may have that. That is approved.

Q. (By Mr. LeGros): Do you have the question in mind? A. Yes.

Q. And what is your answer, sir?

A. It is necessary that they have rates filed.

Q. And how can those rates be filed?

A. The rates are submitted by either individual companies or by rating bodies to the Insurance Commissioner's office at Olympia.

Q. With what rating body was U. S. F. & G. associated in May and June of 1955?

A. The Surety Association of America. It's quite frequently referred to as the Towner or the board companies.

The Court: How do you spell the word "Towner?"

A. Your Honor, I think it's T-o-w-n-e-r.

My spelling is not usually very good.

Q. (By Mr. LeGros): Mr. Towner for many

(Testimony of Nelson Friday.)

years was president or organizer of the Surety Association?

A. That is where the name Towner originated. He was the gentleman who was the head of it many, many years ago, and the Surety Association of America is an outgrowth of that.

Q. And is it customary, Mr. Friday, in the field of bonds [154] for rate schedules to be changed at periodic intervals?

A. As far as bonds are concerned, no. Changes in bond rates are extremely rare. In my personal knowledge I know of very few changes in bond rates. They remain fixed for many years.

Q. Now, handing you what has been marked as Plaintiff's Exhibit No. 11, which is a rate schedule, could you tell me what was the effective date of that rate schedule which you hold?

A. The effective date of this revision was April the 30th, 1951.

Q. And do you know of your own knowledge, Mr. Friday, to what date that rate schedule was effective?

A. This particular page was effective until July the 20th, 1955.

Q. Is that the date upon which the new rate schedule went into effect?

A. That is the date on which the new rates were to be effective.

Q. Now, Mr. Friday, in filing these rate schedules with the Insurance Commissioner and in the case of the board companies associated wth the Surety

(Testimony of Nelson Friday.)

Association of America, do the member companies know the rate schedule that is being contemplated?

A. The actual filing of those rates are made by the Surety [155] Association of America direct with the Commissioner on behalf of the members of the Association or the surety companies.

Q. And prior to the effective date do the members of the Association know what the rate will be?

A. They do not reveal it to the—except the members that set on the committee that decides on the particular changes.

Q. In other words, the Association acts through a committee of the various members?

A. That's right. They get the approval of the committees on these things and they are filed with the Commissioner at that time.

Q. Now, it's an admitted fact in this case, Mr. Friday, that this 1955 revision was filed on July 5, 1955. A. That is correct.

Q. When was the rate schedule announced to the trade?

A. The rate schedule was not announced to the trade until July the 20th. I say July 20th. Sometimes we get them in one day in advance or two days. They are always timed, or they are purposely mailed in such a way as to reach the trade within a day or not more than two in advance of the effective date.

Q. And why is that, Mr. Friday?

A. That is for the purpose of arranging any jockeying or [156] manipulating. In other words,

(Testimony of Nelson Friday.)

when the rate is effective it's to be effective on that date, and all members of the committee are expected to follow it from that date. If it became common knowledge in advance there might be some jockeying on the thing.

The Clerk: Plaintiff's Exhibit No. 13.

(A card entitled Members of The Surety Association of America was marked Plaintiff's Exhibit No. 13 for identification.)

The Court: Where is the head office of the Surety Association you mentioned?

A. It's in New York City.

Q. (By Mr. LeGros): Mr. Friday, handing you what has been marked as Plaintiff's Exhibit 13, can you tell me what that document is, please?

A. That's a list of the members of the Surety Association of America, those members that adhere to the rating schedules and formulas as filed by the Surety Association.

Q. And does that include the United States Fidelity & Guaranty Company? A. It does, sir.

Mr. LeGros: I will offer Plaintiff's Exhibit 13.

Mr. Simon: It's objected to as irrelevant and immaterial. [157]

The Court: Overruled. That exhibit is now admitted.

(Plaintiff's Exhibit No. 13 for identification was admitted in evidence.)

The Court: Will you state again what that exhibit is? Give it the shortest name you can think

(Testimony of Nelson Friday.)

of but let the name of it reflect the information contained in it.

A. List of the members of the Surety Association of America.

The Court: Membership list?

A. Yes, sir.

Q. (By Mr. LeGros): Now, Mr. Friday, what proportion of the surety business in the United States is written through board companies, if you know?

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: On what issue is that—

Mr. LeGros: This is merely background.

The Court: The objection is overruled.

A. I couldn't state positively, it varies between the years. I would venture the guess that it would be somewhere between 65 to 75 per cent.

Q. (By Mr. LeGros): And in the State of Washington?

A. In the State of Washington that's not true. There's a [158] much larger percentage that's written by the non-bureau companies.

Q. And do you think that was one of the factors which may have influenced the rate change of 1955?

Mr. Simon: Objected to as leading and speculative and immaterial.

The Court: That is sustained.

Mr. LeGros: I'll strike the question.

Q. (By Mr. LeGros): Mr. Friday, in your

(Testimony of Nelson Friday.)

organization how many attorneys in fact did you have in 1955? A. We had four.

Q. And who were they, please?

A. Mr. Beeson, myself, Don Rogers and Miss Lotta Hershey, a young lady who's been with us for some thirty years.

Q. And those people are empowered to do that under that authority?

A. They have the power of attorney to affix their seal and act on behalf of the company as far as surety matters are concerned.

Q. That would be on behalf of the United States Fidelity & Guaranty Company?

A. That is correct, sir.

Q. Now, Mr. Friday, on these bonds in issue, which involved a liability of in excess of six million dollars, does the United States Fidelity & Guaranty Company insure [159] that entire liability itself?

Mr. Simon: Objected to as irrelevant and immaterial.

Mr. LeGros: It's preparatory to—

The Court: It is overruled.

A. They do not.

Q. (By Mr. LeGros): And how do they not cover that entire liability itself?

A. They are the originating company on a bond of that type and they will carry a portion of the bond themselves and reinsurance the balance.

Q. Could you explain for the jury what is meant by reinsurance?

(Testimony of Nelson Friday.)

A. Well, reinsurance is a matter in—to cite an example, on a bond they may agree that they wish to carry 25 per cent of the overall exposure under the bond themselves. They will arrange with other companies to assume the remaining 75 per cent. Each company takes a portion of the premium, their proper proportion of the premium, and assumes the proper proportion of any losses that may result from that primary bond.

Q. Now, in the case of a bond such as we have here filed with the United States Government, is it necessary that the reinsurance be arranged prior to the execution of the bond? [160]

A. It is necessary, because once you write a bond no bonding company is going to go in and reinsure you after the bond is written. It would be like insuring something after a loss occurred or where it might occur. They like to have a look at all the facts before the bond is committed.

Q. Now, Mr. Friday, in this particular case of the two bonds in question here, the payment bond and the performance bond, was reinsurance arranged for these bonds? A. Yes, sir.

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. LeGros): And could you tell us approximately when this reinsurance was arranged?

A. Well, the reinsurance would be arranged for prior to the time that the bid bond was issued. In this particular case I can't recall all these dates

(Testimony of Nelson Friday.)

just offhand, but it was undoubtedly sometime shortly prior, I'd say approximately a week prior to the time the bid bond was provided and the bids submitted, bids opened.

Q. At that time did the United States Fidelity & Guaranty Company know the exact amount of the bid or what the exact amount of the contract would be?

A. No, we do not know, we prefer not to know the exact [161] figures. We like to have an upper limit. The contractor will tell us that the job may run as much as X dollars, because he doesn't wish to reveal his exact figures to us and we like to know—quite obviously we've got to know the maximum amount that we're going to bid exposure for.

Q. And was that done in this case? A. Yes.

Q. What was the maximum amount?

A. As I recall it was around some seven million dollars.

Q. And with how many companies did United States Fidelity & Guaranty Company arrange for reinsurance?

Mr. Simon: If the Court please, may I have a continuing objection to this line of inquiry upon the ground and for the reason that the same is not relevant or competent to any issue in this case?

Mr. LeGros: I think it will come out.

The Court: I think you ought to state what the issue is now that this has a material bearing on.

Mr. LeGros: Yes, your Honor. I will show by this witness that the reinsurance was arranged with

(Testimony of Nelson Friday.)

the various reinsurers prior to the execution of the bond at the rate of premium that was charged to the defendant in this action. In other words, that the United States Fidelity & Guaranty Company incurred a [162] very substantial liability for 75 per cent of the premium charged to various insurers prior to the time of the execution of this bond.

Mr. Simon: If the Court please, it is our position that there isn't anything in the pleadings that raise any such issue, and it's irrelevant and immaterial. How they handled the premium that they contracted to get from us is of no primary concern of ours, any more than it's a concern of ours as to how much Mr. Friday deducted and how much the home company got of the premium that we agreed to pay. And the fact that they went through this elaborate arrangement with other companies may mean that the local office, Mr. Beeson didn't fully report what had transpired, but it seems to me that what arrangements they made with other companies is entirely irrelevant and immaterial to any issue in this case.

The Court: The objection is overruled. The Court asks you to be as brief as possible. I note that it is nearly four o'clock.

Mr. LeGros: Yes, your Honor. I have just a few more questions.

Q. (By Mr. LeGros): What percentage of this risk did United States Fidelity & Guaranty Company retain?

(Testimony of Nelson Friday.)

Mr. Simon: May it be understood again that as [163] to this new line of inquiry my objection heretofore stated continues?

The Court: Is there any objection?

Mr. LeGros: No, your Honor.

The Court: Very well, the Court approves of that. Will you read the question? I did not hear it.

(The reporter read the question as follows:

"Q. What percentage of this risk did United States Fidelity & Guaranty Company retain?"

A. They retained—

The Court: The word "did," is that—

Q. (By Mr. LeGros): What percentage of the risk did United States Fidelity & Guaranty Company retain?

A. They retained 25 per cent of the risk themselves.

Q. And among how many companies was the remaining 75 per cent spread?

A. There was 50 per cent of it that was spread between six different companies, and then 25 per cent of it went into what they call treaty arrangements in which there are groups of companies that assume certain amounts. I can't say how many member companies are in that treaty. It's a treaty arrangement that they have. It's like a joint venture in the contracting business. In other [164] words, we minimize our exposures.

Q. Now, in spreading this risk, Mr. Friday, did you report a premium to these other companies?

(Testimony of Nelson Friday.)

A. Yes, we did.

Q. And what premium was reported?

A. The forty-seven thousand some odd dollars that has been referred to here quite frequently.

Q. And did that premium form the basis upon which you would have to account in payment to the various other members among whom you spread this risk?

A. That is correct. All your reinsurance is arranged for at the rate that is in effect in the state so that it will not be discriminatory at the time that the bond is executed.

Q. And did the United States Fidelity & Guaranty Company become obligated to those other companies for premiums in that amount?

Mr. Simon: I object——

A. That is correct, for their pro rata proportion of it.

The Court: Just a moment.

Mr. Simon: I object to that as leading.

The Court: The objection is sustained. The answer to the question is stricken and the jury will disregard it as if you never had heard it. Proceed.

Q. (By Mr. LeGros): Did the United States Fidelity & Guaranty [165] Company incur any obligations to these companies who were now sharing the risk? A. Yes.

Q. What was that obligation?

A. They incurred an obligation to those companies to share with them their pro rata propor-

(Testimony of Nelson Friday.)

tion of the total premium that had been accepted on the bond or written on the bond.

Q. Mr. Friday, when was it that you first discussed the dispute which arose between the joint venture and U. S. F. & G. with the members of the joint venture?

A. My personal discussion of it, the first time that I personally got into the matter, as I recall it, was along in November or sometime in that date.

Q. And with whom did you discuss this matter?

A. My discussion at that time was with Mr. Baldwin and Mr. Oja.

Q. And did you in response to a request from Mr. Baldwin set out in a letter the full basis of your position in this suit?

A. Yes. I—he asked me at the time if I would give him the varying rating bases that would apply, the different dates that they would apply, the amount of the premiums and so forth, and I set out as carefully as I could the complete information and how we arrived at the various [166] rating bases.

Q. And that letter was sent to Mr. Baldwin approximately about what time?

A. The latter part of the year. Now, it was along in November or December of 1955. I can't recall the exact date. I recall that I didn't get into it until the premium became delinquent.

Mr. LeGros: You may examine.

The Court: Cross examine.

(Testimony of Nelson Friday.)

Cross Examination

Q. (By Mr. Simon): Mr. Friday, in this matter of the delinquency of the premium, I'll ask that you be furnished with a copy of Defendant's Exhibit A-1.

The Court: That will be done.

(The exhibit was handed to the witness.)

A. Yes, sir.

Q. (By Mr. Simon): Were you familiar with the fact that such a letter had been written?

A. I was not familiar with this letter at the time it was written, no, sir.

Q. That is a letter from your office concerning this matter?

A. It is a letter from our office and it is standard procedure for our treasurer to look after the collection [167] of premiums. I personally can't do those matters myself and I rely upon the boys to take care of it for me, sir.

Q. That letter was sent by your treasurer?

A. By our treasurer, yes, sir.

Q. And it provided for the payment of the premium of \$35,000 plus therein specified in three installments and asked that the first of those three installments be paid, did it not?

A. Yes, sir, it provides for the amount due here of \$35,815.29 which was McCollister & Company's proportion of the premium for the bond.

Q. And it provided or requested that that sum of \$35,000 be paid in three equal installments?

A. That is correct.

(Testimony of Nelson Friday.)

Q. And said that this was the understanding between the parties?

A. Basically that, yes, sir.

Q. It says, "In accordance with our understanding we respectfully request that you now remit to us the first of these thirds?" A. That's correct.

Q. And very promptly after this letter was received by Islands Construction Company your company got the first check for eleven thousand and some dollars? A. That's correct, yes, sir. [168]

Q. And thirty days thereafter or thereabouts your company got a second installment of one-third of that amount? A. That's right.

Q. An equal amount of eleven thousand plus?

A. Correct, sir.

Q. Which would have been in October?

A. I assume that it was in October, sir. I don't—

Mr. Simon: Well, while we're about it may the witness be shown Plaintiff's Exhibit 6?

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): Those have been introduced in evidence in this case as having been the vouchers attached to the receipts, I mean the vouchers which formed a part of Islands, Anderson and Montin's checks which were made in payment to McCollister & Company of this premium?

A. That's correct.

Q. And then in the upper left-hand corners of these two slips are some dates?

(Testimony of Nelson Friday.)

A. There are some dates, and very frankly those dates, because of my familiarity with our treasurer's handwriting, appear to be his handwriting and possibly the dates on which they arrived in our office at that time. That would be my guess. Now, I'm just assuming that.

Q. That's based on your knowledge of your office procedure? [169]

A. I would say that the one check from this thing here, knowing the handwriting and everything, arrived at our office on September the 19th, the second installment arrived there on October 21st, sir.

Q. And the 19th is about four days later than this instrument, Defendant's Exhibit 6?

A. September the 14th, that's correct, they received it on the 15th.

Q. So that the next payment which you would have expected to have received pursuant to the terms of this letter would have been—you would have anticipated receiving sometime around the middle of November? A. Correct, sir.

Q. And when you did not receive that, that was about the time that you became personally interested in this problem?

A. Yes, sir, as far as I know, sir.

Q. Now, do you have any idea of where Mr. Beeson got the information which he gave to Mr. Anderson and to Mr. Baldwin in early May or sometime in May at the time of the discussion of

(Testimony of Nelson Friday.)

this bid bond to the effect that the board companies were going to reduce their rates so that they would be competitive with the non-board companies in the State of Washington?

A. Mr. Simon, we're always looking for business in this [170] area, and the non-board companies out here have been after us for a long time, and for many years those of us that operate basically through board companies connections have not been satisfied with the pro rata portion of the business that we got in this area. We felt that we were entitled to a better percentage of it and we saw no reason why our competitors should take it away from us at what we referred to as a lesser rate. We tried for many years and have tried for many years to overcome that competition. It's not been a matter that's come to a head within just a short time. They've advocated for many years meeting that competition, and there was considerable agitation on the part of these companies to get in here and compete with these companies so that we could get our same proportion that they were getting in the eastern states. That thing was beginning to come to a head.

The Court: I believe that is sufficient.

The Witness: I'm sorry. All right. Thank you, sir.

The Court: Ask him another question.

Mr. Simon: Very well, your Honor.

Q. (By Mr. Simon): Mr. Friday, if this bond or these two bonds or these three bonds, one pre-

(Testimony of Nelson Friday.)

mium covered the three bonds, as I understand it— [171] A. Three bonds?

Q. Yes, the bid bond, the payment bond and the performance bond.

A. Yes, sir, that's correct. If you include the bid bond, that's right.

Q. If this bond had been written by Mr. Beeson and by your company in the United Pacific Casualty Company rather than the United States Fidelity & Guaranty Company, what would have been the commission that accrued to your company?

A. It would have been—we get the same percentage of commission as we get, but it would have been on a lesser premium basis. It would have been on the basis of the premium that they used. I can't—

Q. So that roughly your own commission would have been substantially 25 per cent less than it was?

A. It would have been at the reduced rate used by the non-board companies, correct, non-Towner companies, the non-board companies, correct, sir.

Q. Yes. Now, can you tell us what your commission, the commission of McCollister & Company, would be if the premium on these bonds were calculated at the amount which was inserted by your company in Plaintiff's Exhibit 1?

A. In actual dollars and cents? [172]

Q. Yes.

A. I can't tell you in actual dollars and cents because it's—

(Testimony of Nelson Friday.)

Q. Well, can you tell us within a thousand dollars?

A. It would be somewhere around six or seven thousand dollars. I can't figure it out exactly here. I could get the exact figures if they will be pertinent. The reason I say that is because it's on a varying scale, and it's not on a fixed schedule. As Mr. Beeson pointed out in his testimony, your scale of commissions was 30 per cent on the first two and a half million dollars of the bond, and from there on it grades down.

Q. How much was the premium on the first two and a half million of this bond?

A. Oh, I'd have to figure the thing out. There's a letter here in the place, in the office, that will show it to me, but—you have a copy of it and so do we.

Mr. LeGros: Is that set out in your letter of December 28th?

A. I think I could calculate it from there in less time than I could from any other letter.

Mr. LeGros: Do you want to offer the letter of December 28th? I have a copy of it here, Mr. Simon, if you want to—well, go ahead, use yours.

Mr. Simon: That's fine.

Mr. LeGros: Go ahead, I'd just as soon have [173] the original anyway.

The Court: Let it be marked.

The Clerk: It will be marked Defendant's Exhibit No. A-2.

(Testimony of Nelson Friday.)

(A letter was marked Defendant's Exhibit No. A-2 for identification.)

The Court: Give him a chance to give the document a name that reflects the nature of its information.

Q. (By Mr. Simon): Calling your attention to what has been marked for identification as Defendant's Exhibit A-2, Mr. Friday, I'll ask you whether that is the letter which you referred to on your direct examination as having been written to Mr. Loren Baldwin's company regarding this matter?

A. Yes, sir, that is the letter.

Q. And it's dated—

A. I see here it's dated December 28th.

The Court: What subject does the letter pertain to? A. It's a rate comparison.

Q. (By Mr. Simon): Now, using those figures can you roughly calculate what premium McColister & Company expected to acquire on the issuance of this bond by U. S. F. & G. if the premium charged was 47,000? [174]

(Witness computing.)

A. If we had received credit for the full \$47,000 premium in our office—

Q. Yes.

A. And had not charged 25 per cent to Oklahoma City, the total premium on that, the total commission on that would have been around some eighty—oh, I'd say eighty-two, eighty-three hundred dollars. Now, I'm just—

Q. Eighty-two to eighty-three hundred dollars?

(Testimony of Nelson Friday.)

A. That's correct, sir, if that's accurate enough.

Q. And to repeat somewhat, if the board company rate were reduced 25 per cent to make it competitive with the non-board rate, the commission that you would actually have received would be approximately two thousand dollars less?

A. Roughly two thousand dollars less, that's accurate enough, yes, sir.

Q. Mr. Friday, following the receipt of your letter that you have identified as Defendant's Exhibit A-2 there were tendered to your company and to Ancel Earp of Oklahoma City checks for the total amount shown by the—the balance shown by the lesser calculation, were there not?

A. I can't say about Ancel Earp. I can say as to our office, we did get a check in, which was carefully and [175] meticulously drawn to indicate that it was final payment on the bond, which check was returned.

Q. Now I'll ask you whether you wrote a letter returning that check in which you said, "According to our information"—

Mr. LeGros: I'll object, if the Court please. If he's going to read from the letter, he should offer it.

Mr. Simon: Your Honor, I'll ask this gentleman whether he recalls having written any letter at any time which contained words substantially of the following import: "According to our information, pursuant to similar instruction"—

Mr. LeGros: The same objection.

The Court: The objection is sustained.

(Testimony of Nelson Friday.)

Q. (By Mr. Simon): Well, did you ever tell or communicate with Islands, Anderson and Montin-Benson and tell them that you had information that Ancel Earp & Company were going to return their check also?

A. I wrote them a letter returning our check, and I cannot recall exactly what was in the letter. You have a copy of it there, sir, quite obviously.

Q. You don't recall whether there was anything like that in the letter or not?

A. I don't specifically remember the exact wording of the [176] letter, no, sir. I cannot recall it word for word.

Mr. Simon: Well, to shorten this I think it is agreed, is it not, Counsel, that checks totalling the amounts—

Mr. LeGros: I had agreed with you on that at the recess, Mr. Simon.

Mr. Simon: Yes.

The Court: You may proceed.

Mr. Simon: And that the total amount has been—the tender represented by those checks has—

Mr. LeGros: Is on deposit with the Clerk of Court. I have agreed to that, too.

Mr. Simon: Fine.

Q. (By Mr. Simon): Mr. Friday, I'll ask you whether in discussing this matter with Mr. Loren Baldwin you did not say to him in substance and effect that it would have been a simple thing for you to have adjusted this conflict were it not for the fact that other companies had now become involved

(Testimony of Nelson Friday.)

in it or that other companies than U. S. F. & G. were involved?

A. I certainly cannot recall making any such statement to that effect, no, sir.

Q. You didn't say—

A. In other words,—

Q. You didn't ever say to Mr. Baldwin that if the U. S. F. [177] & G. had not reinsured with other companies this matter could have been adjusted?

A. Well, I would certainly be very foolish to make such a statement.

The Court: No, no, do not argue, just say whether you did or not.

A. I do not recall making any such statement of that type, no, sir.

Q. (By Mr. Simon): Would you say that you didn't make such a statement?

A. I would say that I did not make such a statement.

Q. Very well. Do you recall offhand when the bid bond in this case was executed?

A. I personally do not, because I don't get into the detail handling of these things. No, sir, I do not.

Q. But the reinsurance had been effected, I think you testified, prior to the execution of the bid bond?

A. That's right. Arrangements had been made for adequate reinsurance prior to the arrangements of the bid bond.

Q. This bid bond to which you have referred

(Testimony of Nelson Friday.)

was executed after the execution by the signers thereof of Plaintiff's Exhibit 1, the application for bonds?

A. Well, I can't tell you the exact dates of these things because I personally didn't handle them.

Q. No. [178]

A. All I could go by would be what our standard procedure is. If you wish that I'll be very happy to tell you.

Q. Yes. Well, your standard procedure would indicate that you wouldn't issue a bid bond until you had the acceptance on file.

A. We don't have written acceptance, we have commitments from the various companies as to what percentages they are willing to accept.

Q. No, you and I are talking about different things.

A. O. K., let's—you get it clear and I'll answer you the best I can.

Q. I'm talking about Plaintiff's Exhibit 1, which was an application for the issuance by U. S. F. & G. of bonds. A. Correct.

Q. That was originally submitted as an application for a bid bond? A. Correct, sir.

Q. And I say that was executed by the people who signed it before you actually executed and delivered a bid bond pursuant to it?

A. Quite obviously, yes, sir.

(A bid bond was marked Defendant's Exhibit No. A-3 for identification.)

(Testimony of Nelson Friday.)

Q. Yes. Now calling your attention to what has been marked for identification as Defendant's Exhibit A-3, I'll ask [179] you whether you recognize that as the bid bond which your company executed in connection with this matter?

A. Yes, it is, sir.

Q. Can you from an examination of that instrument tell us what the date of the delivery of that bid bond was?

A. Well, all I can tell you is that it was quite obviously a short time prior to May the 18th.

Q. I see.

A. Whether it was a day or two or three I can't tell you.

Mr. Simon: I offer in evidence Defendant's Exhibit A-3.

Mr. LeGros: No objection.

The Court: Admitted.

(Defendant's Exhibit No. A-3 for identification was admitted in evidence.)

Q. (By Mr. Simon): So that Plaintiff's Exhibit 1—

Mr. Simon: Could that be handed to the witness?

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): —was signed by Martin Anderson sometime prior to the 18th of May, 1955?

A. If this were the actual signing of the bid bond, yes, sir. I personally have not knowledge whether it was the signing of the bid bond or the

(Testimony of Nelson Friday.)

completion bond. That is something that I suppose only the jury can determine. [180]

Mr. Simon: I offer, if I have not offered in evidence, I do now offer in evidence Defendant's Exhibit A-2.

Mr. LeGros: No objection.

The Court: Admitted.

(Defendant's Exhibit No. A-2 for identification was admitted in evidence.)

Mr. Simon: No further questions, your Honor.

Redirect Examination

Q. (By Mr. LeGros): Mr. Friday, referring to Defendant's Exhibit A-1, which is the letter of September 14th—

A. The letter of December 14th?

Q. September 14th.

A. September 14th, correct, sir, yes.

Q. Does that have reference to any other document?

A. It refers to this particular bond that is under discussion, if that's what you have in mind.

Q. Does it refer to any statement?

A. It refers to our statement of September the 1st, 1955, correct, sir.

Q. And are you familiar with the statement of September 1, 1955? A. I am, sir. [181]

Q. And does that show a one-quarter application of the bond premium to Ancel Earp?

A. That shows the one-quarter that was to be credited to Oklahoma City, that is correct, sir.

(Testimony of Nelson Friday.)

Q. Now, Mr. Friday, does any agent writing for United States Fidelity & Guaranty Company through McCollister & Company have any authority to contract for any rate other than the rate which shows on the ratings on file and in effect at the time a bond is written?

Mr. Simon: Objected to as irrelevant and immaterial, if the Court please.

The Court: That objection is overruled.

A. We very definitely do not, sir.

Q. (By Mr. LeGros): Must all employees of the United States Fidelity & Guaranty Company adhere to the ratings on file?

Mr. Simon: The same objection.

The Court: Overruled.

A. Yes, sir. Under Insurance Department regulation we would have no alternative other than to do it without violating the law, and it's not our intention to violate the law.

Q. (By Mr. LeGros): Are there any penalties prescribed for violation of the law?

A. Very severe penalties. [182]

Mr. Simon: I object to that.

The Witness: I'm sorry.

The Court: The objection is overruled.

Mr. LeGros: I have no further questions.

The Court: Is there anything else of this witness? I understand there is none. You may step down.

(Witness excused.)

The Court: You may call the next witness.

Mr. LeGros: I at this time have a deposition which I would like to publish.

The Court: All depositions have been published. If they have not been, they are now.

Mr. LeGros: It is the deposition of William V. Montin, one of the joint venturers, and I would like to call him as an adverse witness. Do you wish me to take the stand, your Honor, and read the responses?

The Court: I wish whoever will read the answers to take the stand, and either Mr. Simon or Mr. Palmer, whichever one wishes to do so, will read the questions beginning at Page 3 with the words "Direct Examination by Mr. Oliver".

Mr. LeGros: If the Court please, if I may preface that with a statement, this is an examination on behalf of the plaintiff. [183]

The Court: But as I understand it he was then called and you now call him—

Mr. LeGros: As an adverse witness.

The Court: As an adverse witness?

Mr. LeGros: Yes, your Honor.

Mr. Simon: Well, if the Court please, I think that the stipulation indicates—the stipulation on Page 2 of the deposition indicates the character of this interrogation on the taking of the deposition, and I find nothing in it to indicate that there was any stipulation that it was taken as an adverse witness.

The Court: What portion of the rule gives the right to take a deposition of a witness as an adverse witness?

Mr. LeGros: That is not specifically set forth in the rule, your Honor, simply a statement that depositions may be offered in evidence if the witness is not available, and I'm simply stating the same limitation that would be made on him if he were here present in court.

The Court: I will have to see some authority before ruling in your favor on that.

Mr. LeGros: Yes, your Honor.

The Court: I understood there was objection.

Mr. Simon: Yes, your Honor. [184]

The Court: To his using this deposition testimony as that of or with like effect as if he had called him as an adverse witness.

Mr. Simon: That's right.

The Court: And without being bound thereby.

Mr. Simon: That's right.

The Court: The objection to his doing so is sustained. What is your pleasure with respect to further use of this deposition or non-use of it?

Mr. LeGros: If I cannot call him as an adverse deponent I will withdraw the deposition.

Mr. Simon: I have no objection to that.

The Court: The matter respecting this deposition proposed by plaintiff is discontinued and withdrawn.

Mr. LeGros: If the Court please, plaintiff will now rest its case in chief.

The Court: The defendant may now proceed with defendant's case in chief.

Mr. Simon: Call Mr. Oja.

The Court: He has already been sworn. He will

now resume the stand for further interrogation on behalf of the defendant. [185]

VERN J. OJA

recalled as a witness by defendant, being previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Simon): Mr. Oja, you have heretofore been sworn, I think. A. Yes, sir.

Q. And you were interrogated to some extent as an adverse witness by Mr. LeGros yesterday?

A. Yes, sir.

Q. Mr. Oja, I'll ask that you be handed Plaintiff's Exhibit 1.

(The exhibit was handed to the witness.)

Q. That, Mr. Oja, as I understand it, is the application which was obtained by the McCollister Company for the execution of bonds, a bid bond in the first instance and payment and performance bonds, and was procured by Mr. Beeson. I'll ask you whether on the second page—Page 3 actually of that form of application your name appears?

A. It does.

Q. And in what capacity did you sign that?

A. As secretary of Islands Construction Company.

Q. I'll ask you, Mr. Oja, whether at the time you signed that form of application the typewritten figures 47,000 [186] and so forth at the top of that sheet had been inserted in that blank?

A. It was not.

(Testimony of Vern J. Oja.)

Q. Mr. Oja, I'll ask you whether you had anything to do with the negotiations leading to the execution of these bonds? Were you present when the conversations were had between Mr. Beeson on the one hand and Mr. Anderson and Mr. Baldwin on the other? A. I was not.

Q. Mr. Oja, were you present in Mr. Baldwin's office when Mr. Nelson Friday was in the office of Islands Construction Company discussing the settlement of this—I mean adjustment of this dispute between you as to the proper amount of premium?

A. I was.

Q. I'll ask you whether at that time in Mr. Baldwin's office and in the presence of Mr. Baldwin Mr. Friday did not say in substance and effect—

Mr. LeGros: I'll object, if the Court please.

The Court: May I have the question read.

(The reporter read the last partial question.)

Q. (By Mr. Simon): —that—

Mr. LeGros: Ask him what was said.

The Court: The objection is sustained. You [187] are at liberty to ask the witness what this person said.

Mr. Simon: I thought I had laid the foundation for an impeaching question, but I'm perfectly willing to put it the other way.

Q. (By Mr. Simon): Were you present when the discussion took place between Mr. Nelson Friday and Mr. Loren Baldwin with reference to an adjustment of this matter of the dispute?

A. I was.

(Testimony of Vern J. Oja.)

Q. Will you tell us according to your best recollection when that was?

A. I believe it was sometime in December of '55.

Q. And what in substance and effect did Mr. Nelson Friday say?

A. Well, in substance he stated that he could not make any settlement or an adjustment of this particular premium and primarily because U. S. F. & G. had reinsurers in connection with this particular premium and they couldn't get an adjustment possibly from the reinsurers and that was where the difficulty was.

Q. Was anything said by him as to whether it would have been possible for him to have adjusted this matter were it not for the presence of reinsurers?

A. I'm sure it was. It was stated that U. S. F. & G., if [188] they were the primary insurer on the bond they could make their—make an adjustment.

Q. Did he indicate how that could be done?

The Court: Answer yes or no.

A. No.

Mr. Simon: I think that's all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. LeGros): Mr. Oja, referring now to Plaintiff's Exhibit 1, when that document was presented to you was any of the typewritten material inserted in that document?

A. I believe the only typewritten material—the

(Testimony of Vern J. Oja.)

only typewritten material was "Anderson Construction Company, Islands Construction Company, Montin-Benson Company", referring to our signatures.

Q. Referring to the first page, was any of that material contained thereon?

A. The typing at the very top of the page indicating the full name of the applicant.

Q. And was this document delivered to you at your office?

A. It was delivered to us by Jack Beeson at our office.

Q. And had anyone else signed it prior to your signature?

A. I don't remember whether it was signed by anyone prior [189] to my signature or not. I can't tell you that.

Q. And did you ask Mr. Beeson about the rate of premium on a bond for six plus million dollars?

A. I did not at that time.

Q. You had no concern whatsoever about the amount?

A. Certainly I had a concern in the amount.

Q. But you were executing a blank document on negotiations that you knew nothing about?

A. It was common procedure to execute blank documents with Jack Beeson.

Q. Yes. You have complete confidence in Mr. Beeson, do you not? A. Yes, sir.

Mr. LeGros: Now, this cross examination, I

(Testimony of Vern J. Oja.)

don't know if I can conclude it or not. It might be rather lengthy.

The Court: How long do you expect it to take, have you any idea?

Mr. LeGros: Oh, five or ten minutes. I have some records that I asked him to bring here that I would like to identify.

The Court: I wish you to proceed then.

Q. (By Mr. LeGros): Mr. Oja, in response to a subpoena duces tecum served upon you did you bring with you certain documents? [190]

A. Yes.

Q. Pertaining to the bid computations by the joint venture leading toward the bidding on this project?

A. Yes. I believe our Counsel has it in his file.

Q. Can he produce them at this time?

A. Yes, he can.

(Documents were handed to Mr. LeGros.)

The Court: Does Counsel for the defendant now produce the documents requested in the subpoena duces tecum?

Mr. Simon: They were so identified to me, your Honor.

Mr. LeGros: They may be marked as one exhibit.

The Clerk: It will be marked Plaintiff's Exhibit No. 14.

(Records of Islands Construction Co. were marked Plaintiff's Exhibit No. 14 for identification.)

(Testimony of Vern J. Oja.)

Q. (By Mr. LeGros): Mr. Oja, you have before you the figures used by the joint venture giving your bid on the Ladd-Elmendorf project, do you not? A. Yes, I do.

Q. And those are records of your office?

A. They are.

Mr. LeGros: I'll ask that Plaintiff's Exhibit [191] 14 be admitted.

The Court: Any objection?

Mr. Simon: I object to it as irrelevant and immaterial.

The Court: Overruled. Plaintiff's Exhibit 14 is now admitted.

(Plaintiff's Exhibit No. 14 for identification was admitted in evidence.)

Q. (By Mr. LeGros): How many various schedules were there to the project on which you were bidding?

A. Individual items, there were hundreds.

Q. I'm speaking now of schedules.

(Witness computing.)

Q. It went from A through H, did it not?

A. Yes.

Q. And H was subdivided into—

A. There were nine schedules.

Q. Yes, and could you refer to your Schedule A and to your work sheet there? A. Yes.

Q. Do you have your schedule set up so that you can tell as to the allocation in that schedule for a bond or bond premiums?

A. I cannot, as a percentage was used.

(Testimony of Vern J. Oja.)

Q. And what percentage was allocated to that?

A. Well, it was various in various items. There are one, two, three, four, five schedules under this schedule, five unit items, and they varied from a ten per cent overhead item to a three per cent overhead item.

Q. In other words, in your schedules your bond premiums are carried in your overhead item?

A. They are carried as an overhead item.

Q. And what other than bond premium does that include?

A. Supervision, trucking, equipment, gas, oil, taxes, insurance of various types, 150 items if you wish me to enumerate them all individually.

Q. And does the same pertain to each of the following schedules, in general?

A. In general that's true.

Q. Now referring to Schedule H, why on that one do you have an item entitled Bond and Profit, \$80,000?

A. Schedule H was calculated and estimated in a different office by different employees. They were under Mr. Anderson's supervision in his office in the Central Building, and his methods were entirely different than the methods we used. We consolidated the figures and arrived at a total figure in our office.

Q. Well, then would it be true to state, Mr. Oja, that in your office you computed Schedules A through G and Mr. Anderson in his office computed Schedule H? [193]

A. That's right.

(Testimony of Vern J. Oja.)

Q. And you don't know how it was that he set up an item of Bond and Profit, \$80,000?

A. No, I don't know how he arrived at that particular figure.

The Court: The Court will have to interrupt the proceedings here today. I have some other matters to consider.

The jury, subject to the Court's previous admonitions and subject to what I suggested to you yesterday about being prepared to remain together at a late hour or even overnight applies to your jury service tomorrow. Please bear it in mind and so advise your family members. You will now retire subject to the Court's previous admonitions. The jury will now retire until tomorrow morning at ten o'clock. Be here at ten o'clock tomorrow morning instead of 9:30.

(Thereupon, at 4:40 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Thursday, May 16, 1957.) [194]

Thursday, May 16, 1957, 10:00 o'clock a.m.

(All parties present as before.)

The Court: Bring in the jury.

Mr. LeGros: I was going to ask your Honor for the record, I understood in chambers that the legal question as to the——

The Court: What we said in chambers had nothing to do with the record in this case and will not be made a part of the record in this case. We were discussing informally the instructions to be given

by the Court. Nothing said by you or Mr. Simon or Mr. Palmer or the Court in chambers is a part of the record.

(The following proceedings were had within the presence of the jury.)

The Court: Let the record show that each and all the jurors are present and also that all parties on trial with their Counsel. You may proceed.

Mr. Simon: Mr. Oja was on the stand.

The Court: Mr. Oja will resume the stand for further interrogation.

VERN J. OJA

resumed the stand.

Cross Examination—(Continued)

Q. (By Mr. LeGros): Mr. Oja, I believe at the conclusion of yesterday's [195] session I was interrogating you as to Schedules H-1 and H-2 which you had advised me were prepared in Mr. Anderson's office. A. Yes, sir.

Q. And I take it they were then used together with your own work in preparing your final bid?

A. Yes, that's right.

Q. Now referring to your Schedules A, B, C, D, E, F and G, I note that you have the work set up so that you have a series of columns across the page. A. Yes.

Q. And you have a code at the top indicating what each column represents. I wonder if you could tell me what the abbreviations or the letters at the top of each column indicate.

(Testimony of Vern J. Oja.)

A. Well, in the very first—this is a unit price contract based on unit prices for dirt and for fill and for the construction of various parts.

Q. Yes.

A. So that the very first column represents the government pay quantities. In other words, the amount of quantities you should figure on. In other words, in one case excavation for building, 50 cubic yards. The next column represents material. These happen to be figures of our estimator in our office. And "L" stands for [196] labor, "S" subcontract, freight, overhead, profit, unit price bid, then you calculate that times the total quantities and get your total price for the particular job.

Q. Well, now you have left some of them out. What is "ER"?

A. I'll have to talk to Mr. Bailey. He has his own code and I'm not certain whether that means—

Q. I think you previously stated that your bond computation or your bond allowance was figured in overhead. A. In overhead, that's right.

Q. And Mr. Anderson in his work sheets figures bond and profit? A. Separately, yes.

Q. Now, can you look at those work sheets and tell me what amount you have allotted to bond in each of your schedules? A. I cannot.

Q. Can you look at that and tell me what you've allotted to profit? A. Yes.

Q. And is that on a percentage basis or on a dollar basis?

(Testimony of Vern J. Oja.)

A. It's on a dollar basis in lots of cases. In some cases it's percentage. It varies as you go through the whole job.

Q. And percentagewise what does it average out to? [197]

A. I would imagine it would come pretty close to five or six per cent.

Q. I see on some of these it's seven and a half per cent.

A. On some bids we don't put any profit on them, I mean on account of the fact that they would be practically all subcontract and there would be no profit on it because they would be performing the work.

Q. I see on "A", for instance, you have a profit of \$10,545 and that figures seven and a half per cent.

A. Yes. That just happens to be that way, but you have to take into account individual items in calculating that thing.

Q. In that schedule overhead, including all your items, is figured at 7.2 per cent?

A. 7.2 per cent. That includes—

Q. Roughly your profit and your overhead come out the same? A. And the bond.

Q. The overhead, according to your statement, would include the bond? A. Yes.

Q. Now, Schedule B, your overhead is \$16,506 and your profit is \$19,032?

A. That's right, yes.

Q. Now, Schedule C, your overhead including

(Testimony of Vern J. Oja.)

all the items you mentioned is \$107,782 and your profit is figured at [198] \$119,833?

A. That's right. That was a larger building.

Q. And on Schedule D, the overhead including all the items composing that is \$7,832 and a profit of \$8,460? A. Yes.

Q. And on Schedule E, overhead of \$105,721, a profit of \$116,289? A. That's right.

Q. And on Schedule F, overhead at \$3,161 and profit at \$3,321? A. That's right.

Q. And on "G", overhead at \$5,525 and profit of \$3,156? A. That's right.

Q. Do you know what the percentage of your overhead on these schedules the bond was allotted for? A. No, I don't.

Q. So in looking at these work sheets of yours there is no way you can determine by figure or percentage the amount that was allotted to bond?

A. That's right.

Mr. LeGros: No further questions.

The Court: You may ask any questions on redirect which you feel are necessary. [199]

Redirect Examination

Q. (By Mr. Simon): Mr. Oja, when the checks which were tendered to McCollister & Company and to Ancel Earp & Company were returned by those people, did those returned checks and the letters returning them come to your attention? Was that part of your duty? A. Yes, they did.

(Testimony of Vern J. Oja.)

Mr. Simon: I would like to have those marked, please.

The Court: That will be done.

The Clerk: It will be Defendant's Exhibit A-4. Do you want them together, Mr. Simon?

Mr. Simon: Yes, put them together.

(Two letters were marked Defendant's Exhibit No. A-4 for identification.)

Mr. LeGros: If the Court please, is Mr. Simon reopening his direct so that I may have an opportunity to cross examine on this?

The Court: Are you reopening or seeking to reopen?

Mr. Simon: Yes. I suppose this isn't—

The Court: Do you ask leave to do that?

Mr. Simon: Yes, your Honor.

The Court: Have you any objection? [200]

Mr. LeGros: No objection.

The Court: You may reopen, and the right of cross examination is always fully preserved.

Mr. LeGros: I have no objections to the letters being admitted, to save the time of qualifying them.

Q. (By Mr. Simon): Mr. Oja, those letters comprising Defendant's Exhibit A-4 are two letters, one from McCollister & Company signed by Mr. Friday? A. That's right.

Q. And what is the date of that?

A. January 25th, 1956.

Q. And the one from Ancel Earp?

A. January 20, 1956.

(Testimony of Vern J. Oja.)

Q. Those letters returned to you the checks therein described? A. Yes.

Q. Were those checks that were thus returned checks drawn on banks in which you had sufficient money to pay them if they had been presented?

A. Yes, sir.

Mr. LeGros: If the Court please, that has been stipulated to and admitted yesterday, I believe.

The Court: Is there any reason why that should not dispose of it? [201]

Mr. LeGros: I stipulate they made a valid and continuing tender.

Mr. Simon: I offer in evidence Defendant's Exhibit A-4.

Mr. LeGros: No objection.

The Court: Admitted.

(Defendant's Exhibit No. A-4 for identification was admitted in evidence.)

The Court: What kind of papers do you call them, Mr. Oja? Give a name that reflects the kind of information in them.

A. Well, they are letters of transmittal on the refusal of the checks in full payment of the bond, letters of transmittal from the various bonding companies on the final payment checks.

The Court: Do Counsel agree on a name that could be applied to them that would be a quick way of referring to them in case somebody loses track of them?

Mr. Simon: I should say that they might be described as letters rejecting tender.

(Testimony of Vern J. Oja.)

The Court: You may proceed.

Mr. Simon: I think that's the extent of my additional examination.

The Court: You may cross examine.

Mr. LeGros: I don't care to cross examine. [202]

Mr. Simon: All right, Mr. Oja, you may be excused.

The Court: The witness is excused from the stand.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Simon: Call Mr. Baldwin at this time.

The Court: Come forward. You have already been sworn as a witness, Mr. Baldwin. Come forward and take the witness stand as a witness for the defendant.

LOREN ELLSWORTH BALDWIN

recalled as a witness by defendant, being previously duly sworn, was examined and testified further as follows:

The Court: State your name again for the record.

A. Loren Ellsworth Baldwin.

The Court: Ellsworth?

A. Yes, sir.

The Court: You may inquire.

Direct Examination

Q. (By Mr. Simon): You have heretofore identified yourself, Mr. Baldwin, [203] as the president

(Testimony of Loren Ellsworth Baldwin.)
of Islands Construction Company which is one of
the joint venturers mentioned in this arrangement?

A. That's right.

Q. And under the terms of the joint venture
agreement the administration of the affairs of the
day-to-day conduct of this activity was by Para-
graph II of that agreement entrusted to Islands?

A. That's right.

Q. Islands having a 50 per cent share of the
venture? A. That's right.

Q. But the matter of insurance and bonds was
left by express provision of that agreement to you
and to Mr. Anderson? A. That's right.

Q. I'll ask you whether you know Mr. J. C.
Beeson, John C. Beeson, who was on the stand
here yesterday? A. Yes, I do.

Q. How long have you known him?

A. About twenty years.

Q. Have you had occasion during that time to
do business with him with reference to the obtaining
of bonds? A. Yes.

Q. What kind of bonds?

A. All types of bonds. [204]

Q. To what extent did you do business with him
over that period?

A. Well, he wrote practically exclusively all of
our bonding requirements for the construction busi-
ness.

Q. From what period on?

A. Oh, from 1941 until the present day.

Q. During that entire time did Mr. Beeson ever

(Testimony of Loren Ellsworth Baldwin.) tell you that the Insurance Commissioner of the State of Washington had anything to do with the rates that he quoted you? A. Never.

Q. Were you ever informed from any other source? A. No, sir.

Q. Until this lawsuit commenced were you ever told by anybody? A. No, sir.

Q. Now will you tell us in your own words about the discussion which you and Mr. Anderson had with Mr. Beeson prior to the signing of the bid bond application which is Plaintiff's Exhibit 1 in this case?

A. Well, under a new arrangement I had started shipping our cargo to Alaska by barge and it entailed a heavy risk, and insurance for barge transportation is very difficult to obtain unless good insurance people are fully informed of the cargo and who is going to haul it, [205] so I discussed the matter with Martin Anderson and Martin said, "Well, I've been wanting to get these rates out of the way so that we can put them on our estimate sheets for figuring this job, and we'll call up Mr. Beeson and have him come down to our office." Beeson's office is in the same building as Mr. Anderson's.

Beeson came down to the office and we discussed the insurance rates, and then we asked Mr. Beeson, "What about the bond?" We stated we had been quoted a rate from a California bonding company and we were thinking about doing business with them. Mr. Beeson stated that if we would leave

(Testimony of Loren Ellsworth Baldwin.)
the bond to his discretion, that he was sure that the bond would be taken care of as cheaply with his company as any other company. We asked him if that would be with a non-board company or a board company and he said, "Well, the board companies are going to compete with the non-board companies." He said, "I have advance information, and you can rest assured that you will be given the advantage of any reduced rate."

Mr. Anderson and I were both satisfied, having used Mr. Beeson practically exclusively for our business, and we told him to proceed to arrange the bid bond for our bidding the project.

Q. Now, was there any discussion at that time as to the difference in the rate then being charged as between the [206] U. S. F. & G. on the one hand and the non-board companies on the other?

A. Yes, there was.

Q. What was that discussion?

A. Well, Mr. Beeson had been writing bid bonds with non-board companies for me on other projects that I had been constructing. I called this to his attention, this being a large job, and told him that we were bearing down, and asked him about the rate, and he assured me that the rate would be comparable to a non-board company's rate.

Mr. LeGros: Pardon me, Mr. Baldwin. May I ask you to speak up a little? It's pretty hard to hear you.

The Court: Mr. LeGros, if there is some part of

(Testimony of Loren Ellsworth Baldwin.)
it you wish to have repeated I will have all or part
of it read back by the reporter.

Mr. LeGros: If I could have the last answer
read. I missed parts of it.

The Court: Very well. That will be done.

(The reporter read the last answer.)

Mr. LeGros: Thank you.

Q. (By Mr. Simon): Did he tell you what the
differential was at that time between the non-
board rate and the board rate? [207]

A. No, he didn't. I knew pretty well what it
was, having just used a non-board rate on a previous
job.

Q. And what was your information at that time
as to the differential between a non-board rate and
a board rate approximately?

A. Well, we spoke of percentage figures.

Q. About— A. Yes, 25 per cent.

Q. The non-board company rate was approxi-
mately 25 per cent less than the board rate at that
time? A. That's right.

Q. Now, in the course of this discussion did Mr.
Beeson say to you that the U. S. F. & G. rate—

Mr. LeGros: If the Court please, I'll object to
that as leading.

The Court: The objection is sustained. You may
ask him what he said, if anything.

Mr. Simon: I want to call his attention specifically
to a statement made by Mr. Beeson in order
that he may acquiesce or contradict it. I'll put it
this way if you like.

(Testimony of Loren Ellsworth Baldwin.)

Q. (By Mr. Simon): Mr. Beeson said yesterday, as I understand it, in substance and effect that he told you that the board companies' reduction would be such that the rate established would be competitive, equal or less [208] than the non-board companies', and that you would be entitled to and he would see to it that you got the benefit of this reduction, he said provided that the reduction was made before your bonds were delivered.

Mr. LeGros: I'll object to that.

The Court: Just a minute. Do you wish to put that in the form of a question?

Mr. Simon: I'll say—

The Court: By asking him, "Did he say that?"

Mr. Simon: Yes.

Q. (By Mr. Simon:) Did Mr. Beeson say to you that or anything comparable to that with reference to the limitation therein stated as to whether you would be entitled to or when you would be entitled to or the condition upon which you would be entitled to the reduction?

Mr. LeGros: I'll object to that question, if the Court please. It is stating all kinds of suppositions to the witness and I don't think he has stated the substance of Mr.—

The Court: My understanding is that Counsel has tried to state the pertinent subject matter of the other witness' statement as a condition of the interrogating part submitted to this witness in the matter. Do you have an objection as it not being—

(Testimony of Loren Ellsworth Baldwin.)

Mr. LeGros: My objection is as to the [209] insertion in the question as to the time of delivery of the bond. I believe Mr. Beeson's testimony was at the time of the effect of the bond, when the bond took effect.

Mr. Simon: Well, I will have no objection to amending the question in that respect.

The Court: Does the witness understand the amendment?

A. Not entirely.

The Court: I just—

Mr. Simon: All right.

Q. (By Mr. Simon): Did Mr. Beeson say that this reduction to which you would be entitled if you signed up for a U. S. F. & G. bond was conditioned upon the reduction being made or announced before the effective date of the bond which was delivered?

A. No, sir.

Mr. LeGros: If the Court please, I object to that, too, the insertion in there as to the reduction being conditioned upon the time of announcement.

The Court: He has a right to ask this witness if Mr. Beeson said any such thing, Mr. LeGros, in the Court's opinion, and the objection is overruled. You may cross examine him as to whether or not Mr. Beeson did say any such thing to him then or yesterday while [210] on the stand.

Q. (By Mr. Simon): Was any such limitation mentioned by Mr. Beeson at all in connection with this discussion?

A. There was no qualification at all, sir.

(Testimony of Loren Ellsworth Baldwin.)

Q. If there had been would you have signed for a U. S. F. & G. bond?

A. No, I would have insisted that my company not sign.

Q. Now, when you——

The Witness: Your Honor, may I make a comment?

The Court: Just a moment. The witness seems to wish to make an explanation of his answer. Is that what you had in mind?

Q. (By Mr. Simon): Had you finished your answer, Mr. Baldwin?

A. Well, I just didn't want everyone here to think that I didn't know how to conduct my business. Naturally I wouldn't have signed for a \$10.00 bond if I could buy a \$7.50 one.

Q. That would do the job?

A. That would do the same job, that's right.

Q. Now, I think when you were on the stand the other day Counsel asked you about these checks which went to McCollister & Company in payment on account. Did you have any conversation with Mr. Beeson at the time that these payments were made as to what the proper rate for this bond was?

A. When the payment was made——

Q. Yes, at or about the time of the payments.

A. Well, we discussed the payments with Mr. Beeson several times in the presence of Mr. Anderson, Mr. Oja, and—I believe that's all, but at various times, and Mr. Beeson said they were working on an adjustment.

(Testimony of Loren Ellsworth Baldwin.)

Q. And did you rely on his assertion that they would effect or that they were working on an adjustment when you made these payments on account?

A. I felt sure, I'm sure they were, sir.

Q. Had you ever had any prior experience on a rate adjustment with McCollister & Company?

A. I can't answer that without our records. We've had discussions on several rates and whatever the difficulty has been it's always been taken care of if there was one.

Q. Well, did McCollister & Company ever take the position that they wouldn't adjust—

Mr. LeGros: If the Court please, I think that's a leading question.

The Court: That objection is sustained.

Q. (By Mr. Simon): Well, in the course of any of these other dealings that you have had with McCollister & Company where there was a discussion about the premium rates, I'll ask you whether McCollister & Company ever refused to discuss an adjustment on the ground that you [212] hadn't protested within any given time? A. No, sir.

The Court: State, if you recall, how many years you have been doing business of this nature with McCollister & Company as insurance agents.

A. Oh, sixteen years. Since 1941. I believe they wrote the first completion and performance bond for our firm in 1941. It could have been prior to that, but I recollect 1941.

(Testimony of Loren Ellsworth Baldwin.)

The Court: You may inquire.

Q. (By Mr. Simon): Now, did you have a conversation with Mr. Nelson Friday about an adjustment of this matter? A. Yes, I did.

The Court: What was the answer?

A. Yes.

Q. (By Mr. Simon): And about when was that?

A. I think it was early December, 1955.

Q. And where? A. In our office on 36th.

Q. And who was present?

A. Mr. Oja, Mr. Friday, Mr. Brenner part of the time, and myself.

Q. What did Mr. Friday say, if anything, at that time about this adjustment of the rate which was the subject of discussion? [213]

A. Well, Mr. Friday said that inquiry had been made from the home office and they would not make an adjustment, and I asked Mr. Friday if he would submit to me what the bond would have cost if it was written in a board company or a non-board company and he said that he would be glad to do that, that he would get the figures for me.

Q. Did Mr. Friday say to you anything at that time as to why his company would not make an adjustment?

A. He said he was very sorry that they didn't make an adjustment, that they valued our business.

The Court: No, Mr. Baldwin, that is not responsive. Read the question. Answer yes or no to the question.

The Witness: The answer is yes.

(Testimony of Loren Ellsworth Baldwin.)

The Court: Wait just a minute. Read the question.

(The reporter read the last question.)

A. Yes.

Q. (By Mr. Simon): What did he say about that?

A. He said that the U. S. F. & G. had reinsured, sold the bond to other insurance companies, and that it was practically impossible to make an adjustment with all these different companies. That's the way I recollect it. [214]

Q. Did he say anything, if you recall, as to what would have been the case if it had not been for this reinsurance? A. Well, yes.

Q. What did he say about that?

A. He inferred that—

Q. No, what did he say, what was the substance of what he said, to the best of your recollection?

A. Well, that an adjustment could be made between the two companies.

Q. Do you mean by that that he could have made an adjustment but for this assignment?

Mr. LeGros: I object to that.

The Court: The objection is sustained. You may ask the witness what he meant by that or something to that effect.

Q. (By Mr. Simon): What did you understand Mr. Friday to mean by what he said?

A. Well, that we would pay the rate that Mr. Beeson had previously given to us for the bond.

Q. But for what, if anything?

(Testimony of Loren Ellsworth Baldwin.)

A. I didn't get the—

Q. Your answer to my mind isn't quite complete.

Mr. LeGros: Well, if the Court please, I'll object to that. [215]

The Court: That objection is sustained. You can ask him another question.

Mr. Simon: All right, I'll try.

Q. (By Mr. Simon): What did Mr. Friday say about why this adjustment to the rate Mr. Beeson had quoted, why his company wouldn't consent to that adjustment?

Mr. LeGros: If the Court please, that's repetitious of what was gone into just a minute ago.

The Court: The objection is overruled.

A. Well, he said that the U. S. F. & G. had sold an interest in the bonds to other companies, or I believe they call it the—

Mr. LeGros: I'll renew the objection.

The Court: The objection is sustained. The answer is stricken to the last question. You may inquire with a proper question if he gives proper answers.

Mr. Simon: I think that's all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. LeGros): Mr. Baldwin, you have stated that objections were made to Mr. Beeson by you as to the statements of account as submitted?

A. I can't hear you. [216]

The Court: Would you like the question read?

Mr. LeGros: Yes.

(Testimony of Loren Ellsworth Baldwin.)

The Court: Will you please read it, Mr. Reporter.

(The reporter read the last question as follows: "Q. Mr. Baldwin, you have stated that objections were made to Mr. Beeson by you as to the statements of account as submitted?"")

Q. (By Mr. LeBros): Is that true?

A. Yes, that's true.

Q. And when was that done?

A. Oh, at various times. I couldn't name them.

Q. When did you begin to make these objections to Mr. Beeson?

A. I don't believe until after we had made payment of the first part of the—

Q. Pardon me, I still can't hear you. That corner of the— A. It might be.

Q. —of the bench there is between us. Would you repeat that, please?

A. I think it was after we made the first payment to the McCollister Company that we discussed this. [217]

Q. That was in September, then?

A. It was when the first invoice was paid, I believe, yes.

Q. That was on approximately September 14th or 15th, somewhere in that neighborhood?

A. That's right.

Q. And it was after you had the telephone call with Mr. Anderson? A. Yes.

Q. And you didn't communicate any objection to Mr. Beeson prior to that time?

(Testimony of Loren Ellsworth Baldwin.)

A. No, there was no occasion.

Q. Did you actually communicate to Mr. Beeson or to anybody in McCollister that attitude, or was that left to somebody else? Did you do it personally?

A. Well, I did it personally to Mr. Beeson.

Q. Do you recall your deposition being taken on April 23rd, 1957? A. Yes, I do.

Q. And I asked you that precise question. The question, reading from Page 8 of your deposition—going back a little further, on Line 7:

“Q. And when did that attitude develop in your organization?

“A. I would say in September or October.

“Q. It wasn’t until that date, however, that [218] you had determined upon that course of action?

“A. No, we had determined we would pay for the bond. I think the first notification we got we determined we would pay a reasonable percentage of the premium.”

A. That’s right.

Q. (Reading) “Q. And did you communicate to Mr. Beeson or anybody in the U. S. F. & G. organization or McCollister & Company that attitude?

“A. No, I didn’t. It was left entirely to Mr. Anderson.”

Now are you changing that testimony?

A. Yes, I would say I’m changing that testimony, because digging into this thing since talking to you

(Testimony of Loren Ellsworth Baldwin.)
has developed several references to conversations
that I've had with Mr. Beeson and Mr. Friday.

Q. You were under oath on April 23rd, 1957?
A. That's right.

Q. Now, Mr. Baldwin, you have stated that you
had this conversation with Mr. Anderson at which
time you were concerned with insurance rates, pre-
miums, bonds, and that sort of thing in connection
with this Ladd-Elmendorf job. When did that con-
versation take place?

A. Well, Martin Anderson and myself had many
conversations. [219] I can't tell you exactly the
date of every conversation we had.

Q. Well, when did the conversation between
yourself and Mr. Anderson and Mr. Beeson take
place? A. I do not know.

Q. Was it in May of 1955? A. Yes, sir.

Q. About what time in May?

A. I would judge the middle of May, there-
abouts.

Q. The middle of May? A. Yes.

Q. Sometime after the 15th of May or—

A. I don't know.

Q. Pardon me? A. I don't know.

Q. Sometime about the middle of May, however?

A. I—you're talking about before the bid?

Q. Yes, I'm talking about the conversation with
Mr. Beeson. A. It was in May.

Q. And at that time did you bring up the ques-
tion of bond or bond premium? A. Oh, yes.

Q. And Mr. Beeson had previously written a

(Testimony of Loren Ellsworth Baldwin.)

number of bonds for you? A. Yes. [220]

Q. And you have stated that you are a practical business man that's not going to pay ten dollars for something you can get for seven and a half?

A. That's right.

Q. So you were concerned with the rate of bond? A. That's right.

Q. And you knew from your past experience that there were two rates, the so-called board rate and the non-board rate? A. That's right.

Q. And you knew there was a substantial difference between the two rates?

A. That's right.

Q. And Mr. Beeson quoted to you a board rate, did he not? A. That's right.

Q. Now, you have stated that you were considering a non-board company. What company was that?

A. The United Pacific and the General and the one in California which had already quoted us. I believe Mr. Oja could tell you that. I don't have the name on the tip of my tongue.

Q. Which one in California?

A. I don't—

The Court: Just a minute. Will you read the witness' answer so Counsel can hear what the [221] witness said, the last statement he made about the California company.

(The reporter read part of the answer as follows: "A. * * * and the one in California which had already quoted us. I believe Mr.

(Testimony of Loren Ellsworth Baldwin.)

Oja could tell you that. I don't have the name on the tip of my tongue.'')

Q. (By Mr. LeGros): Mr. Baldwin, had you previously done any work in Alaska with General Insurance Company as the bonding agent?

A. I'm not sure.

Q. Actually they weren't writing bonds in Alaska at that time, were they?

A. I'm not sure of that.

Q. Had you previously done business with United Pacific Insurance Company?

A. I believe we had, yes.

Q. They are a non-board company?

A. Yes.

Q. And would in all probability that have been the non-board company you would have used?

A. I feel sure it would have been, yes.

Q. That was the only non-board company with [222] which you had established a line of credit, was it not, or a—

A. No, the one in Chicago we had a large line of credit with.

Q. And Mr. Friday had previously arranged bonds for you in United Pacific, had he not, Mr. Baldwin? A. Yes.

Q. And he was at that time an agent for United Pacific as well as U. S. F. & G., was he not?

A. That's right.

Q. Now, Mr. Baldwin, did one of your companies, L. E. Baldwin, Inc., in 1953 write a bond

(Testimony of Loren Ellsworth Baldwin.)
in the amount of \$5,844,000 in the United States
Fidelity & Guaranty Company?

A. I don't know.

Q. Pardon me? A. I don't know.

Q. L. E. Baldwin, Inc., is one of your companies, is it not?

A. Yes, but I can't answer the question.

Q. And you would have signed any bond application in that case, would you not?

A. Yes, I would.

Q. I'll ask you if it's not a fact that on the eight family quarters job at Elmendorf in 1953 you did not write through United States Fidelity & Guaranty Company a bond in that amount?

A. I don't know. [223]

Q. And U. S. F. & G. at that time was a board company and was charging the same rates as were quoted to you by Mr. Beeson, is that not true?

A. I don't know.

Q. Now, Mr. Baldwin, when an invitation for bids was submitted by the government, as required by the Code of Federal Regulations included with the invitation is a Schedule G, I believe it is, which provides for bond requirements; isn't that a fact?

A. I can't answer that question.

Q. And isn't it a fact that bonds filed on government jobs have to be in a form and with a surety approved by the United States Government?

A. I don't believe that true, sir.

Q. Aren't you aware of the provisions of the federal statute?

(Testimony of Loren Ellsworth Baldwin.)

A. Well, I've put up certified checks, sir.

Q. That's character bonds. I'm speaking now of surety bonds.

A. Well, you said it had to be surety bonds. That's not true.

Q. Does the surety bond—

The Court: Just a minute. Did you hear his answer? Read the last answer made by the witness.

(The reporter read the last answer.)

Q. (By Mr. LeGros): I will restrict the [224] answer to surety bonds, and you say that that's not true? A. No, it's not.

Q. That the bonds posted by surety companies with the United States Government do not have to be of such company as is approved by the United States Government?

A. Well, that's not my understanding. You can put up property bonds or cash bonds.

Q. I'm restricting this now to surety bonds. Do you know?

Mr. Simon: Do you mean by "surety bonds" bonds with a compensated surety company as surety?

Mr. LeGros: A surety company, yes.

A. There's no requirement.

Q. (By Mr. LeGros): Pardon me?

A. There's no requirement to my knowledge. You can put up three or four different types of bonds.

Q. Yes, but if you put up a surety bond through

(Testimony of Loren Ellsworth Baldwin.)
a recognized surety company, does that company have to be approved by the government?

A. I don't know.

Q. Now, isn't it a fact, Mr. Beeson,—

A. Baldwin.

Q. Mr. Baldwin, pardon me, that in 1955 the General Insurance Company was not writing bonds in Alaska of the type that you desired?

Mr. Simon: Objected to as repetitive. [225]

The Court: That objection is overruled.

A. I don't know.

Q. (By Mr. LeGros): And isn't it a fact, Mr. Baldwin, that the bonding limit of the United Pacific Company to write bonds in Alaska in May and June of 1955 was limited to the sum of \$644,000?

The Witness: May I comment, your Honor?

The Court: I think you should answer yes or no as to whether you knew that.

Q. (By Mr. LeGros): Isn't that correct?

A. I don't know. I assume that it's correct.

The Court: The question was whether or not you knew.

A. No, I don't know.

Q. (By Mr. LeGros): Pardon me?

A. No, I did not know that.

Q. You didn't know that?

A. No, I did not know that.

Q. Now, your previous answer was that you assumed that was correct.

A. Well, if you'll let me comment on it I can explain.

(Testimony of Loren Ellsworth Baldwin.)

Q. Certainly, you may if you wish.

A. United Pacific is no different than the board companies. They can co-insure. They sell their insurance and that's the limit for the one company. [226] The U. S. F. & G. may have a limit on it, but when they go out on the market they can build this up to maybe \$640,000 per company. In five companies it's three million dollars, ten companies six million dollars. U. S. F. & G. on the bond that was just written they stated used seven or eight or nine companies, and the same thing applies to United Pacific, I assume, just reading between the lines. That is their limit.

Q. Now, Mr. Baldwin, isn't it a fact that if you got a United Pacific bond you would have to get at least enough companies with enough authorized resources approved by the government on the primary obligation of the bond to equal the amount of the bond?

A. The same as U. S. F. & G., yes, sir.

Q. Well, isn't it a fact, Mr. Baldwin, that at the same time United States Fidelity & Guaranty Company was authorized by the government to execute bonds up to the amount of \$10,828,000?

A. I don't know.

Q. By itself? A. I don't know.

Q. Now, Mr. Baldwin, any bond that you got through the United Pacific Insurance Company in the past was gotten in connection or in conjunction with several companies together. [227]

The Court: Put it in a question, "Is that true?"

(Testimony of Loren Ellsworth Baldwin.)

or—

Q. (By Mr. LeGros): Is that not the fact?

A. I can't answer. I don't know.

Q. And that each company executed a separate bond for the respective amount of their obligation and filed that bond with the government?

A. I can't answer that. I don't know.

Q. And isn't it a fact, Mr. Baldwin, that in writing the bond on this occasion you were forced to use a board company, United States Fidelity & Guaranty Company, for the reason that that was the only company that had the resources?

A. No, sir, never, never. That's silly. No.

Q. Pardon me?

A. I say no. I say that's silly. No.

Q. So you were willing to write a bond with a company having a 25 per cent higher rate?

A. No, never.

Q. Relying upon an alleged agreement with Mr. Beeson that at some later date there may be a reduction in rates in an indeterminate amount?

A. No. No, that's not true.

Q. And you state that you are not familiar with the requirement that bonding companies must be [228] approved by the government? A. No.

The Court: By what?

Mr. LeGros: By the government, bonds filed with the government.

A. No, I'm not.

Q. (By Mr. LeGros): Mr. Baldwin, isn't it a fact that in August of 1951 through your corpora-

(Testimony of Loren Ellsworth Baldwin.)
tion L. E. Baldwin, Inc., through Mr. Beeson you wrote a bond in the amount of \$3,481,400 for the two airmen barracks at Elmendorf?

A. I really can't tell you. I would like to comment on that with your permission, sir.

The Court: If it is needed, Mr. Baldwin, to make your answer full, true and correct, you may do that.

A. Well, unfortunately my business is contracting. I have hired a certified public accountant, Mr.—

The Court: I do not feel that is necessary or even responsive. If there is some reason that makes more full and understandable your answer, very well, but what you are saying does not seem to the Court to be reasonably responsive.

A. Well, I do not purchase the bonds or that's not in my part of the business.

Q. (By Mr. LeGros): In other words, Mr. Baldwin, you don't have anything to do with the bonds?

A. Only the— [229]

Mr. Simon: I object to that as—

Mr. LeGros): I think it's a proper question.

The Court: The objection is overruled. Read the question, Mr. Reporter.

(The reporter read the question as follows:

“Q. In other words, Mr. Baldwin, you don't have anything to do with the bonds?”)

A. The setting up of the general business and the payment of them, yes, but the over-all subscription to our requirements I do not handle.

(Testimony of Loren Ellsworth Baldwin.)

Q. (By Mr. LeGros): But you just happened in this particular instance to participate in the bond negotiations?

A. In all bond negotiations, after they are selected I sit down and discuss them, yes.

Q. After they are selected?

A. After, and with all the parties involved, yes.

Q. Yes. Well, I'll ask you in that case I last referred to in August of 1951 isn't it a fact that there were eight companies there involved on the primary obligation of the bond? I'm not speaking of reinsurance now, I'm speaking of primary obligation on the bond.

A. I couldn't tell you, sir. [230]

Q. And that one of the companies, one of the eight companies primarily on the bond was United Pacific? A. I don't know.

The Court: At this point we will take the mid-morning recess and the jury will retire to the jury room. Court will be at recess for about ten minutes.

(Short recess.)

The Court: All are present as before the recess. You may proceed.

Q. (By Mr. LeGros): Mr. Baldwin, referring to Plaintiff's Exhibit 14, which are the schedule of estimates used by yourself, by your corporation and Mr. Anderson, is there anything in that which would enable you to tell us what percentage or what amount was estimated as the figure to be allotted for the bond? Do you have the exhibit?

A. No, I don't.

(Testimony of Loren Ellsworth Baldwin.)

The Clerk: Which number, please?

Mr. LeGros: 14. It's the Manila folder and the binder.

(The exhibit was handed to the witness.)

A. No, there is not any definite figure set up for the bond.

Mr. LeGros: I have no further questions. [231]

Redirect Examination

Q. (By Mr. Simon): Mr. Baldwin, I'll ask you in connection with the question that Counsel asked you about whether any non-board companies would have been acceptable in this situation whether in this discussion that you've related with Mr. Beeson Mr. Beeson made any statement on that point to you and Mr. Anderson? A. Yes, he did.

Q. What did he say?

A. He said we could purchase a non-board policy or a board policy, bond.

Q. On the basis of your prior experience with Mr. Beeson tell us whether or not you relied on him as to the selection of—I mean all of the details with reference to the preparation of a suitable bond acceptable to the government. A. Yes.

Q. Now, you said in answer to a question put to you by Mr. LeGros that ordinarily in the matter of the obtaining of bonds where your company alone was involved you didn't attend to that personally, but Mr. LeGros asked you whether it just happened that in this case you had charge of bonds. I'll ask you to refer to what has been marked for

(Testimony of Loren Ellsworth Baldwin.)
identification as Plaintiff's Exhibit 9 here. [232]
Do you recognize that? A. Yes, sir.

Q. That is the joint venture agreement under which the three companies cooperated. The three companies, Montin-Benson, Anderson Construction Company and your company, Islands Construction Company, cooperated in the performance of the work undertaken under this government contract DA-826, did they not? A. Yes, sir.

Q. I'll ask you whether or not on Page 3 of that specific contract in this case immediately above Paragraph IV, whether you will read, please, to the jury the paragraph immediately above the paragraph numbered IV?

A. (Reading) "Management"—

Mr. LeGros: If the Court please, I will offer this Exhibit 9 into evidence.

Mr. Simon: I have no objection to its reception, except I should like, if the Court please, the privilege of substituting a conformed copy for it. This is the original.

Mr. LeGros: I was going to suggest that.

The Court: As I understand, this is their only original.

Mr. Simon: Yes.

The Court: That is the so-called joint venture agreement. [233]

Mr. LeGros: Yes, your Honor.

Mr. Simon: Yes, your Honor.

The Court: It is now admitted.

(Testimony of Loren Ellsworth Baldwin.)

(Plaintiff's Exhibit No. 9 for identification was admitted in evidence.)

The Court: And I ask you to state in the record what the date of it is.

Mr. LeGros: June 14th.

The Court: Is it June 3rd or June 14th?

Mr. Simon: June 14th, your Honor.

The Court: Will Counsel say in answer to the Court's question what thing is dated June 3rd, 1955?

Mr. Simon: That is Plaintiff's Exhibit 1, which has been identified as—

The Court: The bid application?

Mr. Simon: The bid application, your Honor, bears date as of June 3rd.

Mr. LeGros: It has been identified I believe as an application form. I don't think it's been—I think that's a matter—

The Court: Is it the bid bond application?

Mr. Simon: Well, it's a bond application.

Mr. LeGros: Bond application.

The Court: Is that something different, then, [234] from the bid bond application?

Mr. LeGros: There's a question as to whether this constitutes the bid bond application or the payment and performance bond application.

The Court: Is there anything marked for identification in this case which may properly and should be distinguished from this one by being called a bid bond application?

Mr. LeGros: No, your Honor.

(Testimony of Loren Ellsworth Baldwin.)

The Court: Then the same thing that heretofore has been denominated by the Court as the bid bond application was when it was marked, namely marked Plaintiff's Exhibit 1, what you are now referring to, is it, as the bond application?

Mr. LeGros: Bond application.

The Court: Pardon?

Mr. LeGros: Bond application.

The Court: Do both sides prefer the name of Exhibit 1 as bond application?

Mr. Simon: Well, I think it's a fair statement, your Honor. We contend that it was both a bid bond application and a performance and payment bond application.

The Court: Is the bond application just now stipulated as such what is now marked Plaintiff's [235] Exhibit 1 according to Counsel's understanding?

Mr. Simon: Yes, your Honor.

The Court: And it has the date of what?

Mr. Simon: It is dated as of June 3rd, 1955.

The Court: May I ask Counsel if that Plaintiff's Exhibit 1 is the written agreement referred to on Page 4, Line 29, of the pretrial order?

Mr. Simon: Yes, your Honor.

Mr. LeGros: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Simon): Mr. Baldwin, calling your attention to Plaintiff's Exhibit 9, particularly to Page 3, I should like to ask that you read for the benefit of the jury the paragraph immediately pre-

(Testimony of Loren Ellsworth Baldwin.)
ceding the Roman numeral IV in the center of the page.

A. (Reading) "Management hereunder shall be"—

Q. Will you please keep your voice up, Mr. Baldwin.

A. (Reading) "Management hereunder shall be vested in Martin Anderson and L. E. Baldwin, jointly, and each of the parties hereto agrees to execute a general power of attorney, granting unto them full authority to act for the parties in all matters arising hereunder. Said power of attorney shall further contain a provision authorizing [236] substitution by Mr. Anderson and Mr. Baldwin of another or others to act in their respective places."

Q. Now I'll ask you whether the substance of that agreement had been orally understood between the three companies that signed it prior to the execution of this formal document? A. Yes.

Q. I'll ask you whether the reason that you were concerned with this matter of procuring insurance and bonds in this case for this joint venture arose from that understanding between you, Anderson and Montin-Benson? A. Yes.

Q. That you've just read? A. Yes.

Mr. Simon: That's all.

The Court: Anything else?

Mr. LeGros: Nothing further.

The Court: The witness is excused.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Simon: Call Mr. Anderson.

The Court: Come forward, Mr. Anderson, and resume the stand as a witness on behalf of defendant. You have already been sworn. [237]

MARTIN ANDERSON

recalled as a witness by defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Simon): You have heretofore been identified, Mr. Anderson, as the president of the Anderson Construction Company? A. Yes.

Q. And how long have you done business as the Anderson Construction Company?

A. I think it was 1948.

Q. That's a corporation organized and existing under and by virtue of the laws of the State of Washington? A. Yes.

Q. You're the sole substantial stockholder of it, are you not? A. Yes.

Q. Now, you were present, were you not, at the time of this discussion with Mr. Beeson about the bid bond and performance and payment bonds in connection with the Government Engineers' Contract No. DA-826 on which you, that is your company, Montin-Benson Corporation and Islands Construction Company were jointly going to bid?

A. Yes, I was.

Q. Now tell us approximately when to the best [238] of your recollection this conference took place?

(Testimony of Martin Anderson.)

A. I would say it was in early May.

Q. And who was present?

A. Mr. Beeson, Mr. Baldwin and myself.

Q. Now, with reference to the discussion of the selection of the surety company to execute the bid bond and the performance and payment bonds, did Mr. Beeson have with him upon that occasion any rate schedules? A. I don't think he did.

Q. By the way, how long had you done business with McCollister & Company?

A. The first time in 1937.

Q. And to what extent had you done business with McCollister & Company between 1937 and 1955?

A. Well, up until 1941 I was the superintendent and project manager in the employ of another contractor and had placed business with Beeson for my employer at that time. In 1941—from 1941 on I did business, a substantial amount of business with Jack Beeson on my own behalf, on behalf of the Construction Company.

Q. Now, did you deal with anybody other than Mr. Beeson in your connections with McCollister & Company during that period?

A. Yes. In the beginning in 1941 and '2 I used to deal with Mr. Beeson and also his employers at [239] the time, Mr. John and Dan McCollister.

Q. They both died? A. Yes.

Q. And from that time on you dealt exclusively with Mr. Beeson in connection with McCollister & Company? A. Yes, substantially.

(Testimony of Martin Anderson.)

Q. And what did you understand to be Mr. Beeson's connection with McCollister & Company?

A. I was not cognizant of what his official title was with McCollister Company. He always signed or put under his name on instruments "Attorney in Fact".

Q. Those were on instruments of U. S. F. & G.?

A. Yes.

Q. When you had problems in connection with bonds or bond applications who was the man with whom in McCollister & Company you understood you were to take them up? A. Jack Beeson.

Q. Did Mr. Beeson ever tell you in the course of your dealings with him that the Insurance Commission of the State of Washington had anything to do with the rates that you were required to pay for bonds?

A. No, he did not. I was not aware of that until this became an issue.

Q. And by that do you mean after this case was brought, this action was brought? [240]

A. That's right.

Q. Now will you tell us what your regular procedure was with reference to the obtaining of bonds? I mean by that what would be the first bond that a contractor like you and your associates would be required to obtain, seeking to get a government contract such as this?

A. It would be a bid bond. That has to be submitted with your bid to make the bid valid.

Q. And then do I understand it that if you're

(Testimony of Martin Anderson.)

unsuccessful in the—your bid isn't accepted, you pay a premium to the bond company?

Mr. LeGros: If the Court please, I would not object to the question being asked, but—

Mr. Simon: Well, there's no dispute about this, is there? I mean I was trying to shorten it a little.

The Court: What is the objection?

Mr. LeGros: He's leading.

The Court: The objection is sustained.

Mr. Simon: All right.

Q. (By Mr. Simon): Mr. Anderson, will you please tell us what has been the custom in your dealings with McCollister & Company where they have supplied a bid bond and you were unsuccessful in the bidding as to whether there was [241] any premium collected from you for the execution of the bid bond? A. Yes, there was.

Q. Now, if you were a successful bidder, then in addition to it or supplanting the bid bond at the time you submitted the final contract certain other bonds were required to be furnished; is that not right? A. Yes.

Q. And what are those bonds?

A. A performance bond and payment bond. In some cases only a performance bond.

Q. In this case there was a requirement for both performance and payment bonds?

A. Yes.

Q. If the bid bond was executed by a surety represented by McCollister & Company and you were later awarded the contract and McCollister &

(Testimony of Martin Anderson.)

Company executed as surety the performance and payment bonds, was there any separate premium charged to you on account of the bid bond?

A. No.

Q. I'll ask you whether customarily, or whether in this case Plaintiff's Exhibit 1 was signed by you as an application for the bid bond?

Mr. Simon: Will you hand him Plaintiff's Exhibit 1, please? [242]

The Court: Let him see it, please.

(Plaintiff's Exhibit No. 1 was handed to the witness.)

A. I don't remember the question.

Q. (By Mr. Simon): I asked you whether you signed Plaintiff's Exhibit 1 as an application for the bid bond. A. Yes.

Q. And I'll ask you, did you at any time ever sign any other or different application for the performance or payment bonds in this case?

A. I'm sure we did not.

Q. When this type of application being first signed as an application for a bid bond and the contractor who signed it became the successful bidder, I'll ask you whether it was or was not customary for the employees of McCollister & Company to add the necessary data after its delivery to them to make it an application also for performance and payment bonds?

Mr. LeGros: If the Court please, I object again. That's leading.

The Court: It is leading and the objection is

(Testimony of Martin Anderson.)

sustained. If you have something to show him, it is appropriate to ask him about it or otherwise proceed without leading.

Q. (By Mr. Simon): Now, coming back to this [243] conversation, this conference between you and Mr. Baldwin and Mr. Beeson early in May, where was that held? A. In my office.

Q. And will you tell the members of the jury what was said with reference to the selection of a surety for the bid bond and the performance and payment bonds and the rates, if anything, between you and Mr. Beeson and Mr. Baldwin at that time?

A. We discussed rates on marine insurance, workmen's compensation insurance, and also bonds. I mentioned to Mr. Beeson that this was a large contract and we were interested in getting the most competitive bid we could present, and that the difference between the rates of a board company and a non-board company amounted to a substantial amount of money and that in some cases the difference between the two rates could be enough to swing the bid of a competitive bidder so he could be low if he had a better bond rate, and I said, "What about using a non-board company on this to get the lower rate?" His answer was that, "It's only a matter of a short time until the board companies' rates will be as low or lower than the non-board company rates," and he says, "You're dealing with U. S. F. & G., the largest bonding company in the country, and you're better off to do business with them." [244]

(Testimony of Martin Anderson.)

The Court: Is that all he said that you can think of about the bond premium, the amount of it? If it is not, will you please state what else he said about that subject.

A. He mentioned the fact that it was desirable to do business with a board company because—

The Court: That is not the Court's question. The Court's question relates specifically to the amount of that premium and nothing else, so do not say anything else about any other subject in answer to the Court's question.

A. Well, the amount was the difference—

The Court: It is a question of what he said so far as the Court's question is concerned.

Q. (By Mr. Simon): Your best recollection, Mr. Anderson.

A. I can't recall it, because it was a long conversation and I cannot recollect just what was said in addition.

Q. Well, do you recall whether anything was said about the amount of the contemplated reduction and, if so, what?

Mr. LeGros: If the Court please, I'll object to that as leading.

The Court: The objection is overruled. It appears to the Court that the witness has indicated he has exhausted his own recollection without further interrogation. The objection is overruled. [245]

The Witness: Will you read the question, please?

The Court: Read it.

(The reporter read the last question as fol-

(Testimony of Martin Anderson.)

lows: "Q. Well, do you recall whether anything was said about the amount of the contemplated reduction and, if so, what?"

A. He said the contemplated reduction would make the board companies competitive or lower, as low or lower than the non-board companies. I remember those words very well, "low or lower", "as low or lower".

Q. (By Mr. Simon): State what if anything Mr. Beeson said about it being a condition of getting those lower rates—

Mr. LeGros: I'll object to that, if the Court please.

Mr. Simon: Well, will you allow me to finish my question?

The Court: The objection is overruled at this stage.

Q. (By Mr. Simon): Will you please, Mr. Anderson, tell us whether Mr. Beeson during the course of that conversation said anything as to whether the reduction in rates to become available to you was dependent upon the reduction [246] being made effective prior to the effective date of the bonds that you were seeking?

Mr. LeGros: I object to that as leading.

The Court: Overruled.

A. He certainly did not. He was very emphatic about the reduction.

The Court: That is sufficient.

Q. (By Mr. Simon): If Mr. Beeson had told you that this reduction of rates in order to be of

(Testimony of Martin Anderson.)

any benefit to you would have to take place before the effective date of these bonds, would you have signed this application for bonds with U. S. F. & G.?

A. No, we would not have, if we could get one with a different company at lower rates, and that's what we were after.

Q. Did Mr. Beeson say anything to you as to whether he could obtain for you acceptable bonds from non-board companies at the lower rates?

A. I am quite sure he did, because he had furnished bonds in other companies—

Q. A little louder, please.

A. I'm quite sure he did. He had provided bonds of non-board companies for us before that.

Q. Now, did you have a discussion with Mr. Baldwin at the time of the payment of the first [247] installment of the—the first payment on account of the bond premium in this case, a telephone conversation I believe it was?

A. I don't remember if it was Mr. Baldwin or Mr. Oja. It was one of them.

Q. What was the occasion for that conversation?

A. As I recollect he had an invoice from McCollister Company.

Mr. LeGros: Would you speak up, please, Mr. Anderson?

The Court: I think you would appreciate that as well as anybody else in the courtroom since you have been sitting there at Counsel table. It is nec-

(Testimony of Martin Anderson.)

essary for you to keep your voice raised to a pitch that is comparable to my voice at this moment. I keep my voice raised, not because I like to hear it, but because it is necessary in this room. Raise your voice so all can hear without the necessity of interrupting you. It is always troubling. It is troubling not only to the witness, it is more so to Counsel and others. Proceed.

A. As I recollect the discussion it was regarding an invoice from McCollister Company and the matter of payment, and they wanted my opinion on it, as I recall it.

Q. (By Mr. Simon): And what was said?

A. As I recall it I recommended that we make a payment on account, which is normal with us, on an invoice for bond premiums. [248]

Q. At that time had you had any discussion with Mr. Beeson about the—I mean after the receipt of the invoice or any invoice for these bond premiums had you had any discussion with Mr. Beeson about the amount shown on the invoice statement?

A. Do you mean before we got the statement or the invoice?

Q. No. In the first place, did you ever yourself or Anderson Construction Company receive any invoice from the United States Fidelity & Guaranty Company on account of these bonds?

A. Not to my recollection.

Q. The only invoices so far as you know are the ones that you learned were sent by McCollister &

(Testimony of Martin Anderson.)

Company to Islands Construction Company addressed to their office? A. Yes.

Q. And sometime in September you had a talk with—

The Court: Mr. Simon, that is leading. I think you can avoid leading this witness.

Mr. Simon: All right.

The Court: At least he could be expected to proceed without leading.

Mr. Simon: All right.

Q. (By Mr. Simon): Prior to this time of your conversation with Mr. Oja or Mr. Baldwin about the payment of the first installment on this [249] invoice had you had any discussion with Mr. Beeson about the amount of the bond premium that was shown on that invoice?

A. We probably discussed it at one phase. I was not too concerned about that in our discussion because I thought that if there was any misunderstanding it would be adjusted.

Q. Well, do you recall when you first had any discussion with Mr. Beeson about the amount?

A. I think that I had one prior to the receipt of this invoice. I know I had one after.

Q. And what was said at that time? In the first place, do you recall where this discussion took place? A. It was in my office.

Q. And what was said in this discussion between you and Mr. Beeson?

A. When I learned that we were being billed

(Testimony of Martin Anderson.)

at the standard board rate I was very indignant,
and—

Q. Well, what did you say to Mr. Beeson?

A. I told him that it wasn't right, it wasn't in
accordance with our agreement.

Q. And what did he say?

A. He said he thought that could be adjusted,
and would be adjusted.

Q. Do you recall when that was approximately?

A. It would be a guess if I mentioned a date,
[250] but approximately in September, perhaps,
and I might have had a discussion on it earlier.
I'm not real sure.

The Court: What year were you speaking of in
your last answer?

A. 1955, your Honor.

Q. (By Mr. Simon): How many discussions
did you have with Mr. Beeson about this matter?

A. I'd say three or four, maybe five.

Q. What was their tenor in effect?

A. I beg your pardon?

Q. I say in general what was said by you and
by him on those occasions?

A. We both felt very bad about it.

Q. Well, what was said, Mr. Anderson?

A. I said to Jack, "Are we going to be able to
settle this matter in accordance with our agree-
ment?" and he said, "I think it can be done."

Q. Now, when did you first learn as to the
exact amount of the reduction which U. S. F. & G.
had put into effect?

(Testimony of Martin Anderson.)

A. I think it was in July or August, late July or perhaps in August.

The Court: In this case I say to the jurors I cannot guarantee this case is going to the jury today. I thought it would. I thought some days it would certainly have gone yesterday. I thought [251] again this morning it would go today, but Counsel and I have a lot of work to do that has not been done yet in the absence of the jury. I cannot tell the jury how long that will take. We have to take the time necessary to complete the work, whether it is a half hour or an hour or two hours or three or four, and so the best that I can say, and I wish I could make the results more accommodating to the jury, is that the jury is excused until 2:30. I ask you to return here at that time. The Court and Counsel will endeavor to finish their work by that time, which must be done in the absence of the jury, respecting the instructions in this case, instructions to the jury, but as to how long it will take I cannot tell you. I believe there is a chance that we may get it finished by that time.

The jury will now retire during the noon hour subject to the Court's previous admonition. You may now retire.

(The following proceedings were had without the presence of the jury:)

The Court: Would it be convenient to Counsel to resume our work together on the requested instructions at shortly after 1:00?

Mr. LeGros: Yes, your Honor.

The Court: I would like to begin as soon as [252] we can. Let's say 1:15, will you?

Mr. Simon: Very well, your Honor.

The Court: All those connected with this case so far as the trial proceedings in this court are concerned are excused until 2:15. Try to be back at 2:15. We might get this work done before 2:30 and the jurors might be back before 2:30. I ask those connected with the case to try to avoid contacts with the jurors. Will the bailiffs assist in accommodating those connected with the case, parties or parties' representatives or agents and others, so as to make it convenient for the jurors to come in and out. Counsel and the trial judge will resume their work on the instructions in chambers at 1:15.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 2:15 o'clock p.m.) [253]

Thursday, May 16, 1957

3:05 O'Clock P.M.

(All parties present as before.)

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. You may proceed.

MARTIN ANDERSON

resumed the stand.

Direct Examination—(Continued)

Q. (By Mr. Simon): Mr. Anderson, I believe that immediately before we took the recess at

(Testimony of Martin Anderson.)

lunch time you were testifying about your conversations with Mr. Beeson, your statement to him that the statements received by the joint venture were not in accordance with your agreement with Mr. Beeson. To what agreement did you have reference?

A. The agreement that we would get a rate as low or lower than the non-board companies.

Q. And what did Mr. Beeson say about that?

A. You mean at the time we had the conference with him?

Q. Yes.

A. He said we could rely on a rate as low or lower than the non-board companies and use it in preparation in compiling our bid. [254]

Q. No, I meant at the time of this last conversation that you were testifying to immediately before lunch. What did Mr. Beeson say when you said to him that the statements were not in accordance with this agreement that you had with him?

A. He said he thought they would be adjusted.

Q. How many such conferences did you have with him? A. Two or three.

Q. Did you expect that the statement would be adjusted in accordance with Mr. Beeson's statement to you? A. Yes, I certainly did.

Q. And in the meantime you made a couple of payments on account? A. Right.

Q. Now, these rates that were under discussion

(Testimony of Martin Anderson.)

were based on a minimum period of performance,
I mean the rates for bonds, which called—

Mr. LeGros: If the Court please, I'll object to
the statement of Counsel.

Mr. Simon: All right.

The Court: Sustained.

Q. (By Mr. Simon): Do you know whether the
rates which you discussed with Mr. Beeson had any-
thing to do with the length of the contract, the
performance of which was guaranteed? [255]

A. I understood it was two years.

Q. And I'll ask you—in other words, the mini-
mum rate was for a period of two years?

A. I think so.

Q. And I'll ask you what the period of per-
formance was under this government contract DA-
826 which is under discussion here?

A. You mean the completion dates?

Q. Yes.

A. They varied on different schedules, and I
don't think I can quote the exact dates on each
schedule but I think if I recall correctly one or
two schedules were supposed to be completed in
late 1955, and the other schedules were supposed
to be completed various dates in 1956, but I can't
tell you the exact date of each schedule but I know
that they were all supposed to be completed in
not later than the year 1956.

Q. Mr. Anderson, has the United States Fidel-
ity & Guaranty Company ever been called upon to
assume any loss to take over the completion of any

(Testimony of Martin Anderson.)

contract on any bond they ever wrote for you or any company that you have operated?

A. No, sir.

Q. Do you know whether the same thing is true with reference to the Islands Construction Company?

A. I'm sure the same thing is true. [256]

Mr. Simon: You may inquire.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. LeGros): Mr. Anderson, when was it that you had this conference with Mr. Beeson during which the rates were discussed?

A. As I recall it was in early May.

Q. Now, Mr. Baldwin thought it might be the middle of May? A. I beg your pardon?

Q. Mr. Baldwin thought it might be mid-May. Would that be accurate?

A. The reason I think it was earlier than that is because the bids were originally scheduled to be opened on the 18th of May and they were postponed for a week.

Q. So you made your efforts to get your bond ready for filing and your bonding arrangements completed by the 18th of May, did you not?

A. I'm quite sure we did. I'm not real positive of it because I don't remember just when that extension notice came in.

Q. Handing you Exhibit A-3, that's the bid

(Testimony of Martin Anderson.)

bond. What is the effective date of that instrument? A. May 18th, 1955.

Q. And would you say that your bonding [257] arrangements were completed before that time, that is, you had a commitment as to bonds?

A. Yes.

Q. So when you had this talk with Mr. Beeson and you knew the original bid date was May 18th there was a certain amount of urgency in the obtaining of your bonds, was there not?

A. Not too much urgency on our bid bond.

Q. I'm talking about obtaining your bonding arrangements for the seven million dollar project.

A. Yes, there was some urgency.

Q. Yes. A. It was important.

Q. It was important and it was essential that you get those bonds in proper shape early, was it not? A. Yes.

Q. Now, Mr. Anderson, was Mr. Beeson apprised of the urgency of the matter?

A. I don't think he had to be apprised because he followed it just as closely or closer than we did.

Q. You mean he was in the bond business and he knew when your bonds had to be filed?

A. Yes.

Q. Now, had you ever previously yourself or in conjunction with others used bonds from United States Fidelity & Guaranty Company? [258]

A. Yes.

Q. Even though they have the so-called board rate as distinguished from the non-board rate?

(Testimony of Martin Anderson.)

A. Yes.

Q. In fact in 1951 you got a nine million dollar bond through them, did you not?

A. Yes.

Q. And you paid the board rate?

A. That I don't know.

Q. From U. S. F. & G., they are a board company, are they not?

A. I guess they are. I understand they are.

Q. And that was a project that you entered into in conjunction with the Montin-Benson Corporation in another joint venture, was it not?

A. Yes.

Q. Now, in your dealings with Montin-Benson, and that has involved several different projects, has it not? A. Yes.

Q. They have requested that their proportion of the bonds be billed through Oklahoma City, Ancel Earp, have they not?

Mr. Simon: Objected to as irrelevant and immaterial unless it be confined to this case. [259]

Mr. LeGros: I think this is a question as to his past dealings with Montin-Benson.

The Court: The objection is overruled.

Q. (By Mr. LeGros): Isn't that true?

A. Will you repeat the question?

Q. That Montin-Benson Corporation asked in your previous dealings involving bonds that their billings be through Oklahoma City?

A. That isn't as I recall it exactly.

Q. Pardon me?

(Testimony of Martin Anderson.)

A. That's not the way I recall it exactly.

Q. How do you recall it?

A. As I recall it they were interested to see that Ancel Earp got a share of the bond premium proceeds.

Q. Yes, they were interested in seeing that Ancel Earp got credit for their share of any joint venture. Is that an accurate statement?

A. There was some question of what was their share.

Q. Yes, but they had—you knew of their arrangement with Ancel Earp?

A. I knew there was an arrangement.

Q. Yes. And isn't it a fact, Mr. Anderson, that that was the very reason, because of their close connection with United States Fidelity & Guaranty Company, that that provision was inserted in your partnership agreement [260] allowing each, or not the partnership but in your joint venture agreement allowing each member of the joint venture to give his proportion of any bond or insurance business to his own designated broker?

A. It's quite common in joint ventures.

Q. Wasn't that the case here? A. Yes.

Q. Pardon me? A. Yes.

Q. And it was understood by the members of the joint venture? A. Yes, I think so.

Q. Now, Mr. Anderson, with this urgency for getting the bonds it was necessary that you get a bond that would be readily approved by the Corps of Engineers, was it not? A. Yes.

(Testimony of Martin Anderson.)

Q. And had you done business through any of the non-board companies that could write a bond of up to seven million dollars and have it approved?

A. I don't think I'm competent to answer that question, because the bonding company, we usually assume that any bonding company that will write a bond are capable of providing a satisfactory bond.

Q. In other words, you would leave it up to the bonding company to provide a bond that would be satisfactory to the Corps of Engineers? [261]

A. We usually left it up to Jack Beeson.

Q. Yes, and it was absolutely essential in this case, was it not, that you have a bond by the 18th of May or bonding arrangements by that time which would be satisfactory?

A. Well, it turned out to be the 25th of May.

Q. Yes, but at the time you had the original conference it was the 18th, was it not?

A. I don't know whether they were completed by the 18th of May or not. We may have gotten the notice whereby the urgency was not stringent by the 18th.

Q. My question is that in your original conference early in May you were shooting for a May 18th deadline, were you not? A. That is right.

Q. So when you write your bonds in a board company at the higher rate, as you did previously, one of the controlling factors was in getting a bond that would be approved by the Corp of Engineers, was it not? A. Well,—

(Testimony of Martin Anderson.)

Q. Pardon me?

A. If it wasn't approved there wouldn't be any use of submitting it.

Q. Yes, and the amount of the bond was a very important factor in that, was it not? [262]

Q. You mean the amount of the bid?

Q. The amount of the bond that you would require.

A. Well, that's spelled out by the government, their requirements.

Q. Right. Now, Mr. Anderson, handing you Exhibit 14, the Manila portion of it, and directing your attention to Schedules H-1 and H-2 and particularly directing your attention there to the item marked Bond and Profit, \$80,000. A. Yes.

Q. Now, does that record which you have before you comprise the record which was made through your office as to your figures in estimating this job?

A. It was prepared toward that end.

Q. In your office? A. Yes.

Q. And can you tell us in further detail as to what portion of the \$80,000 figure was allocated to profit and what portion was allocated to bond?

A. No, I cannot without doing a lot of calculating here trying to ascertain what the total amount of the Schedules H-1 and H-2 were. I don't recall it at the moment.

Q. Actually Schedules H-1 and H-2 are one part of nine separate schedules under this same contract, are they not? [263]

(Testimony of Martin Anderson.)

A. I don't think so. I think Schedules H-1 and H-2 were bid separately, if I recall correctly.

Q. Weren't they part of the total bid that was submitted by the joint venture?

A. They were part of the total bid, yes.

Q. Yes. But each schedule was figured separately, was it not? A. Yes.

Q. And you can't tell us at this time what portion of that figure of \$80,000 was allocated to bond?

A. I can tell you an approximate percentage.

Q. And what is that, please?

A. It would be approximately six and a half to seven dollars per thousand of the amount bid, so far as Schedules H-1 and H-2 are concerned.

Q. And Mr. Anderson, did you prepare any other computation to be used in submitting your bid?

A. Do you mean me personally?

Q. You personally or your office.

A. Yes, our office compiled all these other sheets.

Q. In the same exhibit? A. Yes.

Q. Now, Mr. Anderson, when was it that you made your first objection to Mr. Beeson as to the rates charged on this joint venture? [264]

A. The first objection?

Q. The first objection, yes.

A. Well, as I recall we had a discussion on it.

Q. When was that, please?

A. Oh, I think it was in August or September. I don't recall.

Q. Well, your Counsel in preparing a pretrial

(Testimony of Martin Anderson.)

order contended that, "Defendant sometime in October, 1955, for the first time became aware that the rate at which the statements for premium due were being billed to the joint venture was an improper rate and promptly thereupon made inquiry and protest." Would you say that date is more nearly accurate?

A. Well, I was not concerned about the actual billing because we have gotten many erroneous billings in error inadvertently that have always been adjusted.

Q. My question was, was that time of October, 1955, more accurate than the dates that you have mentioned?

A. It may be more accurate in so far as an actual protest is concerned.

Q. Then when Mr. Baldwin called you in September of 1955 as to the payment which was to be made on that date you were advised at that time as to what you were being billed, were you not?

A. In September? [265]

Q. Yes.

A. Yes, we had a discussion over the telephone on it.

Q. And Mr. Baldwin didn't protest then and you didn't protest even though you knew the amount which you were being billed; isn't that true?

A. Well, it depends on what you call a protest. We discussed the matter with the people we had our arrangement with.

(Testimony of Martin Anderson.)

Q. You discussed it with Mr. Baldwin, didn't you? A. Also with Mr. Beeson.

Q. Well, then which date is correct? That's what I'm trying to get at.

A. Well, it's pretty hard to remember the date. I don't remember what I ate for breakfast that morning.

Mr. LeGros: I have no further questions of this witness.

The Court: You may inquire.

Redirect Examination

Q. (By Mr. Simon): Mr. Anderson, in answer to a question put to you by Mr. LeGros as to the calculation that you employed as to bond premium for inclusion in your figure of bond premium and profit, will you tell me what it was that you said?

A. I said about six-fifty to seven dollars per thousand dollars of the amount of the bid.

Q. In other words, that the premium on the bond would be about seven-tenths of one per cent?

A. Yes, six to seven, .6 to .7 per cent.

Q. And these were estimates that you were making to the best of your ability, is that right?

A. That is right. They were finally revised subsequent to preparation of this estimate.

Q. And how was it revised?

A. Downwards. We reduced it.

Q. By how much?

A. \$100,000 over the total job.

Q. In other words, after you had made this

(Testimony of Martin Anderson.)
compilation you submitted a revised bid of \$100,-000 less?

A. Yes, and it was conditioned on receiving an award for the large schedules.

Q. And did that reduction take into account this reduction in the bond rate?

A. The bond premium was a part of that reduction.

Q. When was that final reduced bid submitted, do you recall? A. Submitted?

Q. Yes.

A. It was submitted with the bid on the 25th of May. [267]

Q. The 25th of May?

A. With our original bid.

Q. I see.

Mr. Simon: No further questions, your Honor.

The Court: Anything else?

Recross Examination

Q. (By Mr. LeGros): Mr. Anderson, you say that reduction was reflected in other documents than what you have before you?

A. The reduction was reflected in a letter that we wrote accompanying our bid. There was no time to make any computation sheet because those things—

Q. Where are your work sheets for that reduction? A. I beg your pardon?

Q. Where are your work sheets?

A. We didn't have time to make work sheets

(Testimony of Martin Anderson.)

because that happened about two hours before bid opening time. You get lowered prices on certain things.

Q. You mean your estimate was such that you could just in the flash of—the motion of a pen knock off \$100,000?

A. Not quite that fast, no.

Q. You did it pretty fast though, didn't you?

A. Yes. You have to do it fast on any bid opening in the last two or three hours. [268]

Q. So there was some cushion in your bid?

A. Cushion?

Q. Yes. There was room for—

A. No, you get telephone calls at the last minute reducing prices.

Mr. LeGros: I have no further questions.

The Witness: I beg your pardon?

Mr. LeGros: Nothing further.

The Court: Anything further?

Mr. Simon: Nothing further.

The Court: You may step down.

(Witness excused.)

The Court: You may call the defendant's next witness.

Mr. Simon: The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. LeGros: Yes. I will call Mr. Friday back to the stand.

The Court: You may come forward, Mr. Friday, and resume the stand for further interrogation in rebuttal. [269]

NELSON FRIDAY

recalled as a witness by plaintiff, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

Q. (By Mr. LeGros): Mr. Friday, in your capacity as head of McCollister & Company are you familiar with the bonding companies that are qualified to submit bonds acceptable to the Federal Government? A. Yes, sir.

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: Overruled.

A. It is part of our responsibility to see that a bond does meet the Federal Government requirements, otherwise the contractor and everybody else is bound to be—I mean the bid would be rejected.

Q. (By Mr. LeGros): And does the Federal Government publish any list of companies holding certificates of authority from the Secretary of the Treasury under an Act of Congress approved July 30, 1947?

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: Overruled.

A. Yes, they do. They publish such a list annually. [270]

Q. (By Mr. LeGros): Is that list available to all federal bond approving officers and to persons required to give bonds to the United States?

A. Yes, sir.

(Testimony of Nelson Friday.)

Q. And that would include contractors such as the members of this joint venture?

A. Yes, sir.

The Clerk: Plaintiff's Exhibit 15.

(A document entitled Companies Holding Certificates of Authority from the Secretary of the Treasury under the Act of Congress Approved July 30, 1947 (6 U.S.C., Sees. 6-13) as Acceptable Sureties on Federal Bonds (a), was marked Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked for identification as Plaintiff's Exhibit 15, could you tell me what that document is, please?

A. It's the list published by the United States Treasury Department and lists the companies holding certificates of authority under the Secretary of Treasury under the Act of Congress approved on July the 30th, 1947.

Q. What is the effective date of that document that you have before you?

A. This one was the list that was published on May 2d, 1955. There's an annual list. They vary [271] very slightly from year to year.

Q. And does each company on that list have to requalify each year?

A. That is correct. They reappraise the value that they might be entitled to as far as bond capacity is concerned.

Q. And does that list include on it the bonding

(Testimony of Nelson Friday.)

capacity of each of the companies listed thereon?

A. That is correct, as far as the bonding capacity that they can accept, the Federal Government will accept on behalf of that individual company.

Q. Now, Mr. Friday, in writing a bond to the government, to whom does the government look for its protection?

A. They look to the bonding company. That is the reason for the bond. In other words, we guarantee to the extent of our bond that the job is performed in accordance with their satisfaction.

Q. Yes. Now, when this bond in this particular case was being contemplated what was the extent of bond that was in the minds of the parties?

Mr. Simon: Objected to as irrelevant and immaterial, not proper rebuttal.

The Court: It is not proper rebuttal. I would like to know what there is about this that calls for this inquiry. [272]

Mr. LeGros: Yes, your Honor. Mr. Baldwin—

The Court: As something inspired exclusively in connection with the defendant's case in chief.

Mr. LeGros: Yes. Mr. Baldwin testified as to his ability to write bonds in non-board companies. This is to show that at the time this came up it was not possible to write in a non-board company. I think it's proper rebuttal of that testimony.

Mr. Simon: If the Court please, the testimony of Mr. Beeson yesterday corroborated by Mr. Baldwin today was that Mr. Beeson said, and they looked to Mr. Beeson for this advice, that they

(Testimony of Nelson Friday.)

could write this bond in the United Pacific Casualty Company, a non-board company, and this, if it were material at all, was a proper part of the plaintiff's case and is not proper at this time by way of rebuttal.

Mr. LeGros: Your Honor, that is not my understanding of Mr. Beeson's testimony. His testimony was that these people requested a board company. He was asked by Mr. Simon as to that and he said, "If they requested it, I gave it to them."

The Court: The objection is sustained on the ground it is not proper rebuttal.

Mr. LeGros: What was the last question to which objection is sustained? [273]

(The reporter read the last question as follows: "Q. Now, when this bond in this particular case was being contemplated what was the extent of bond that was in the minds of the parties?"')

Q. (By Mr. LeGros): Mr. Friday, from checking that instrument which you have before you can you determine the bonding capacity of the United Pacific Insurance Company?

Mr. Simon: Objected to as irrelevant, immaterial, not proper rebuttal.

Mr. LeGros: If the Court please, it's a matter I went into with Mr. Baldwin.

The Court: Pardon?

Mr. Simon: Well, it would have been a proper part of his case in chief, if the Court please.

(Testimony of Nelson Friday.)

The Court: It so seems to the Court. The objection is sustained.

Q. (By Mr. LeGros): Now, Mr. Friday, in arranging for a bond in the approximate amount of seven million dollars is it possible to arrange a combination of companies each pooling their resources to gain sufficient bonding strength to have a bond that will be approved by the government and to arrange that in the matter of a few days?

Mr. Simon: The same objection, if the Court please.

The Court: Is it not for the same purpose, to rebut something about this matter introduced by Mr. Beeson you say yesterday and Mr. Baldwin today?

Mr. LeGros: This is the same matter that was taken up by Mr. Baldwin on their case in chief, and I think I'm entitled to rebut it.

The Court: The Court makes the same ruling as it did with respect to the other objection. The objection is sustained.

Mr. LeGros: I will offer Plaintiff's Exhibit 15.

Mr. Simon: The same objection, if the Court please.

The Court: May I see that.

(Plaintiff's Exhibit No. 15 for identification was handed to the Court.)

The Court: Let both Counsel see it again and see if it has any purpose other than this aspect which has been mentioned.

Mr. LeGros: Your Honor, this is something that

(Testimony of Nelson Friday.)

was brought up with Mr. Baldwin, and I think it's admissible in that connection.

The Court: To further clarify and explain [275] his testimony?

Mr. LeGros: To further clarify and explain his testimony, yes, your Honor.

Mr. Simon: I think it's precisely along the line of the prior testimony that the Court has excluded.

The Court: It may be, but I think it has some other value and the Court overrules the objection. Plaintiff's Exhibit 15 is now admitted.

(Plaintiff's Exhibit No. 15 for identification was admitted in evidence.)

Mr. LeGros: I have no further questions.

The Court: Any interrogation, Mr. Simon?

Mr. Simon: Yes, your Honor.

Cross Examination

Q. (By Mr. Simon): Mr. Friday, do I understand you to say that you know that the defendant Anderson Construction Company or any of its officers ever saw Plaintiff's Exhibit 15 or anything like it?

A. I could not say if they saw it, Mr. Simon. I don't know that they did. I personally did not show it to them. It is available, and that's as far as I know.

Q. And generally it would be available in your office?

A. It's available in any bonding office of [276] consequence, and in ours in particular, sir.

(Testimony of Nelson Friday.)

Q. It's one of the things like the Towner rate schedule and the rate schedules of non-board companies that a well-equipped bonding company would have in its files?

A. Yes, sir. Very frequently contractors have them. I don't—they may not have had it themselves, but many of them do have it, sir.

Q. It's one of the tools of the bonding company agent's trade?

A. It's a tool of the bonding company and a tool of the contractor, the same as a Tournapol or a saw or anything else. It's part of the money, it's part of the thing that goes into making money out of the contracting business.

Q. Isn't advice as to what combinations of insurance from bonding companies are possible the sort of thing that a contractor ordinarily consults his bond agent about?

Mr. LeGros: If the Court please, I will object to that as improper cross examination on matters not gone into on the examination on direct.

The Court: Does it relate to this exhibit?

Mr. Simon: Yes.

The Court: The objection is overruled.

The Witness: Just exactly how did the question read? I want to be careful in answering it. [277]

The Court: Read it, Mr. Reporter.

(The reporter read the last question as follows: "Q. Isn't advice as to what combinations of insurance from bonding companies are

(Testimony of Nelson Friday.)

possible the sort of thing that a contractor ordinarily consults his bond agent about?"")

A. That's exactly why we have the bond agency.

Q. (By Mr. Simon): And Mr. Beeson had at his disposal such a list? A. That's correct.

Q. And Mr. Beeson would have the information contained in such a list in mind when he discussed this matter with Mr. Anderson and Mr. Baldwin, wouldn't he?

A. Yes, sir, and if they had confidence in Mr. Beeson, why they would have confidence in his ability to select the proper bonding company for them.

Q. Did you hear Mr. Beeson's testimony yesterday that the United Pacific was an acceptable bonding company for the writing of this bond?

A. I do not know whether he made that statement or not. It is possible to accept the United—I was in hopes I would get to explain that, but you have objected, so I can't help you. [278]

Q. Did you say today to Mr. Baldwin in the washroom out—

Mr. LeGros: I'll object to that, if the Court please, as he's going beyond the scope of the direct examination, as to what was said to Mr. Baldwin today.

The Court: For what purpose do you seek to ask him this question?

Mr. Simon: Well, I think if Counsel will wait until I complete the question it will be self-evident.

The Court: You may finish the question, and

(Testimony of Nelson Friday.)

then do not answer until Counsel has an opportunity to object, Mr. Friday.

The Witness: O. K., sir.

Q. (By Mr. Simon): Did you say to Mr. Baldwin in the washroom out there during the morning recess—

Mr. LeGros: I'll object to a conversation in the washroom.

The Court: The objection is overruled so far as this stage of the question is concerned.

Q. (By Mr. Simon): —that you had erred in your testimony yesterday?

A. Very definitely I did not say that I had erred in my testimony yesterday.

Q. You did not say to him that you were sorry, [279] that you had been in error in what you said about a conversation with him and with Mr. Oja?

A. If you want me to tell the whole story I would be very happy to do so.

Q. I'm just asking you whether you made either of those assertions.

Mr. LeGros: I think the witness is entitled to answer the question.

The Court: Counsel is entitled to have him answer yes or no to the question, and then if it is necessary in the witness' honest belief for him to explain his answer in order to make the statement full, true and correct, the Court will certainly allow him that privilege at this time.

Q. (By Mr. Simon): Your answer is no?

The Court: I do not think he said no.

(Testimony of Nelson Friday.)

Mr. Simon: Oh, I'm sorry.

The Court: Will you answer yes or no?

The Witness: Tell me what the question is again. Now, it's rather left-handed and I want to understand it correctly.

The Court: Let the question be read.

(The reporter read the question as follows:

"Q. You did not say to him that you were [280] sorry, that you had been in error in what you said about a conversation with him and with Mr. Oja?"")

A. I told Mr. Baldwin I was very sorry if there was some misunderstanding as to what I had said to him between Mr. Baldwin and I, because Mr. Baldwin and I are both honorable gentlemen and I'm quite certain that neither one of us felt that either person was lying and that if there was a misunderstanding it was purely a misunderstanding.

Q. (By Mr. Simon): That was the extent of the conversation, was it?

A. That was the extent of it. I think Mr. Baldwin would be very happy to confirm that right this minute.

Q. Your answer to my question is that you did not say that you were mistaken in what you had said about your conversation with him and Mr. Oja in your testimony yesterday?

A. I was not mistaken.

Q. I say your present testimony is that you did not say that to Mr. Baldwin in the washroom?

A. No, sir.

(Testimony of Nelson Friday.)

Q. All right.

Mr. Simon: That's all.

Mr. LeGros: That's all, Mr. Friday. [281]

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. LeGros: That is the rebuttal of the plaintiff, your Honor.

The Court: Any surrebuttal?

Mr. Simon: Yes. I would like to call Mr. Baldwin.

The Court: You may do that.

LOREN ELLSWORTH BALDWIN

recalled as a witness by defendant, having been previously duly sworn, was examined and testified further in surrebuttal as follows:

Direct Examination

Q. (By Mr. Simon): Mr. Baldwin, I'll ask you whether Mr. Friday at the recess this morning in the washroom in the hall here did not say to you in substance and effect that he was sorry that——

Mr. LeGros: I'll object, if the Court please, to the leading.

The Court: The objection is sustained.

Mr. Simon: Well, all right.

Q. (By Mr. Simon): Mr. Baldwin, will you tell us whether you had a conversation with Mr. Nelson Friday in the washroom [282] this morning at the recess? A. Yes, I did.

(Testimony of Loren Ellsworth Baldwin.)

Q. About his testimony yesterday?

A. Yes.

Q. What did Mr. Friday say to you about it?

A. Mr. Friday said he was sorry that he had had to testify the way he did, that evidently he had forgotten the conversation he had had with Mr. Oja and myself. It later developed that—

The Court: No, he asked you not what later developed, but what he said.

Q. (By Mr. Simon): Did he say anything further?

A. Yes. I told him I was surprised and he said, "Well, I'm sure that as two business gentlemen that we understand one another," and that's about the size of it.

Mr. Simon: That's all.

Cross Examination

Q. (By Mr. LeGros): Mr. Baldwin, you mean that the effect of it was that there was a difference of opinion between you and Mr. Friday as to the substance of the conversation you had?

A. Oh, yes, definitely.

Q. In other words, there is a difference, there are two views on the conversation? [283]

A. That's right.

Q. That was the sum and substance of it?

A. Well, I would say materially, yes.

Q. Yes.

Mr. LeGros: That's all.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Simon: The defendant rests.

The Court: Does the plaintiff rest?

Mr. LeGros: Yes, your Honor.

The Court: At this time we are going to take a short recess of about ten minutes or a little less, and the jury will now retire to the jury room for the midafternoon recess.

(Short recess.)

The Court: All have returned to their places as before the recess.

Members of the jury, we have reached such stage in this trial that it is now appropriate for the Court and jury to hear the arguments of Counsel in this case on the merits.

The Court will during the Court's instructions later tell you in a more and better connected way that it is necessary for the jury to remember the evidence [284] and the Court's instructions. Also you will be told that if there should be any conflict between your recollection of the evidence and Counsel's contentions about the evidence, what the facts are, what the evidence to establish, what the probative effect is, that means the effect as proof of a fact, in the case, it is for the jury to say what the evidence is. But, Counsel on each side have the right and they also have the duty to make for the benefit of this jury such reasonable comments and arguments upon the effect, what it tends to show and establish in the way of facts which they honestly think the evidence does show, and Counsel on each side also have a right to have the jury give

(Testimony of Loren Ellsworth Baldwin.)

Q. About his testimony yesterday?

A. Yes.

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A. Mr. Friday said he was sorry that he had had to testify the way he did, that evidently he had forgotten the conversation he had had with Mr. Oja and myself. It later developed that——

The Court: No, he asked you not what later developed, but what he said.

Q. (By Mr. Simon): Did he say anything further?

A. Yes. I told him I was surprised and he said, "Well, I'm sure that as two business gentlemen that we understand one another," and that's about the size of it.

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A. Well, I would say materially, yes.

Q. Yes.

Mr. LeGros: That's all.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Simon: The defendant rests.

The Court: Does the plaintiff rest?

Mr. LeGros: Yes, your Honor.

The Court: At this time we are going to take a short recess of about ten minutes or a little less, and the jury will now retire to the jury room for the midafternoon recess.

(Short recess.)

The Court: All have returned to their places as before the recess.

Members of the jury, we have reached such stage in this trial that it is now appropriate for the Court and jury to hear the arguments of Counsel in this case on the merits.

The Court will during the Court's instructions later tell you in a more and better connected way that it is necessary for the jury to remember the evidence [284] and the Court's instructions. Also you will be told that if there should be any conflict between your recollection of the evidence and Counsel's contentions about the evidence, what the facts are, what the evidence to establish, what the probative effect is, that means the effect as proof of a fact, in the case, it is for the jury to say what the evidence is. But, Counsel on each side have the right and they also have the duty to make for the benefit of this jury such reasonable comments and arguments upon the effect, what it tends to show and establish in the way of facts which they honestly think the evidence does show, and Counsel on each side also have a right to have the jury give

fair and considerate attention to these arguments of Counsel and to give fair and reasonable weight to them.

Remember that Counsel's arguments are not facts, they are not evidence, they are merely legitimate, intended to be legitimate comment on the proving effect, what we say in law the probative effect, of the evidence, with the hope that they can assist the jury in arriving at a true and correct verdict in this case.

Plaintiff has the right to make the opening argument and also the last or the closing argument, and in between those two arguments of the plaintiff will come the argument of defendant through its Counsel. [285]

I understand that there will be two defendant's arguments, so this afternoon for some time we will have the first two arguments, the opening argument of the plaintiff and one of the arguments of the defendant, and then we are going to take a recess in this trial until tomorrow morning and we are going to come back here at the earliest hour that is convenient to the jurors, and I will discuss that with the jurors later to hear the remaining arguments, the one argument remaining on defendant's part and the closing argument of the plaintiff, and thereafter the Court will instruct the jury tomorrow morning, and then tomorrow morning submit the case to the jury for its deliberation and verdict.

At this time we will hear plaintiff's opening argument.

(Thereupon, oral argument was presented to the Court and jury by Mr. LeGros in behalf of plaintiff, and Mr. Palmer in behalf of defendant.)

The Court: Tomorrow morning we will hear further argument from Counsel on both sides and then after that the Court will instruct the jury governing the jury's deliberations, and after that then the case will be submitted to the jury for its final deliberation and verdict.

Until then you are subject to the Court's [286] previous admonition. Do not discuss this case with anyone, do not discuss it or permit anyone to discuss it with you, and I wish you to be reminded that you are subject to all the other admonitions, too, about gaining information about it from other sources. Do not discuss it among yourselves, do not gain any information about this case at all.

Tomorrow the case will be submitted to the jury for your determination and verdict, and that will occur before noon. Then thereafter you will deliberate in the case for the length of time that you think you ought to. There is no rule determining the length of time which a jury does or ought to or does not take to deliberate upon its verdict and to arrive at it. That will be in your hands. That will be entirely in your hands, at least so far as all practical limits are concerned.

The jury, subject to the Court's admonition, will now retire to your several homes and/or places of temporary residence, and I ask you before you go, can you be here at nine o'clock tomorrow morning?

Mr. Petersen, is there some trouble in your case? Do you feel it is—

Juror Petersen: No, I think I can make it all right. I'll make arrangements so I can make it.

The Court: Do you think it is a matter of a few minutes one way or the other?

Juror Petersen: I may be a few minutes late but I'll try to be here on time.

The Court: Will it cause you to suffer greater expense than you would ordinarily suffer?

Juror Petersen: No.

The Court: I say to each and all of you that I do not wish you to feel badly if it turns out impossible for you to get here at nine o'clock. I will know if you do not that it is because of something impossible or something so near *so* it that it did not seem that it could be done. We will wait for you. We hope, however, that you will do everything you reasonably can to be here at nine o'clock tomorrow morning, each and all of you.

Does any other one of you feel any great inconvenience in getting here at nine? Mrs. Dyre, is there any impossibility about it?

Juror Dyre: It isn't impossible, Judge, but I would be so happy if we could have it at 9:30 instead of nine. I would be just so happy with those four boys of mine jumping around and everything.

The Court: Very well, we will make it 9:30 then. [288]

Juror Dyre: Thank you.

The Court: Is there anyone else? Very well, it will be all right, then. 9:30 instead of nine.

Court is adjourned until tomorrow morning at 9:30. You may step down. 9:30.

(The following proceedings were had without the presence of the jury:)

The Court: I have temporarily mislaid, I believe, the extra copy of the pretrial order which I think, I could be wrong about this, Counsel gave me for my own use, office use. By any chance do Counsel have an extra copy of that pretrial order that is legible?

Mr. LeGros: I don't have. I gave your Honor the only other copy that I had.

The Court: I have had one and I have been using one right along, but all of a sudden today it has disappeared. I know no one has thrown it away. Will you kindly—

The Clerk: I'll look downstairs and see if I have one.

The Court: Will you kindly look at your own files and see if you have an extra copy of that pretrial order. It was entered on the 9th, last Thursday. Did you ever see it, Mr. LeGros? I think you prepared it [289] on your stationery.

Mr. LeGros: Yes, your Honor.

The Court: Was there among your copies one that had a red line on the left-hand margin?

Mr. LeGros: No, your Honor. I think all of them had the—it's our instructions that have the red line. We use red line paper for that.

The Court: Very well. All those connected with this case are excused until 9:30 tomorrow morning.

We will hear further argument from Counsel on each side tomorrow morning.

(Thereupon, at 5:00 o'clock p.m., a recess herein was taken until 9:30 o'clock a.m., Friday, May 17, 1957.)

Friday, May 17, 1957, 9:45 o'clock a.m.

(All parties present as before.)

The Court: All are present. The argument of Counsel will now resume and we will hear the concluding argument of defendant's Counsel at this time.

(Thereupon, oral argument was presented to the Court and jury by Mr. Simon in behalf of defendant, and Mr. LeGros in behalf of plaintiff.) [290]

The Court: Members of the jury, you have heard the testimony, have received the evidence and have heard the arguments of Counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

The facts admitted by both sides in this case are:

I.

The plaintiff, United States Fidelity & Guaranty Company, at all times material was and now is a corporation created and continued as such by and under the laws of the State of Maryland, of which it is a citizen and resident.

II.

The defendant, Anderson Construction Co., Inc., at all times material was and now is a corporation

created and continued as such by and under the laws of the State of Washington, of which it is a citizen and resident with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and duly authorized to [291] engage in the business as a surety within the State of Washington, to which has heretofore been paid all prescribed corporate fees.

IV.

This is a civil action in which the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

V.

That defendant signed and delivered to the plaintiff the latter's printed form of application in evidence before you as Plaintiff's Exhibit 1, applying for execution by plaintiff as surety of certain bonds to the United States of America in connection with a certain construction contract known as "DA95-507-Eng-826, Elmendorf and Ladd AFB".

VI.

In connection with said signed printed application the plaintiff executed on behalf of the defendant in favor of the United States of America two bonds; namely, a performance bond, referred to in some places as Government Standard Form 25, in the sum of \$3,085,178.50, and a payment bond, sometimes referred [292] to as Government Standard

Form 25A, in the sum of \$2,500,000, and that on the back of one of said bonds appears a recital that the premium for said bonds was \$47,753.72, and that said bonds together with similar bonds executed by other members of the joint venture of which defendant was a member were delivered by and/or for the defendant and the other members of the joint venture by Islands Construction Co. as manager of said joint venture consisting of defendant corporation and Islands Construction Co. and Montin-Benson Corporation, and were received by and/or for the obligee United States of America on or before the 17th of June, 1955.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

That statements of account in the amount of \$47,753.72 were submitted to Islands Construction Co. as manager of the joint venture on account of the premiums charged under dates of July 1, 1955; August 1, 1955; September 1, 1955; October 1, 1955; November [293] 1, 1955, and December 1, 1955; that the joint venture without protest paid on said account under date of September 1, 1955, the sum of \$11,938.43, and a like sum was similarly paid on account under date of October 21, 1955, which payments were properly credited.

IX.

That notification to defendant and others constituting the joint venture to proceed with performance under their construction contract identified as "DA95-507-Eng-826, Elmendorf and Ladd AFB" was issued by or for the United States of America on the 17th of June, 1955.

X.

That the document now in evidence as Plaintiff's Exhibit 11, being the plaintiff's bond premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the date of April 15, 1951, with respect to the bonds within the classification of the bonds involved in this case, is genuine, and that the amount of bond premium if calculated by using said Exhibit 11 rates for said bonds is \$47,753.72. [294]

XI.

That the document now in evidence as Plaintiff's Exhibit 12, being the plaintiff's bond premium rates as filed with the Insurance Commissioner of the State of Washington on the 5th of July, 1955, for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in this action, is genuine, and that the amount of bond premiums if calculated by applying said Exhibit 12 rates to said bonds is the sum of \$35,576.79.

XII.

That the defendant on or about January 5, 1956, tendered to the defendant two checks, one being for

\$2,805.73 and one being for \$8,894.20, amounting to \$11,699.93, which said tender was rejected by plaintiff and said checks were returned to defendant; that defendant has kept good its tender by depositing that amount with the Clerk of this Court on the 12th day of July, 1956.

You must accept the foregoing admitted facts as true without question as to their truth.

Respecting matters alleged and contended [295] which are not admitted, each party has the burden of proof as to its respective allegations and contentions.

By the term "burden of proof" is meant the obligation to prove or establish a fact by a preponderance of the evidence.

By the term "preponderance of the evidence" or "fair preponderance of the evidence" is meant that evidence on a particular matter which, when fairly, fully and impartially considered by you, has greater weight with you, produces a stronger impression and is more convincing to you as to its truth than that to which it is opposed, and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who may have testified for the one party or the other regarding such matter, since you may take into consideration all of the evidence in the case no matter by which side produced.

The plaintiff United States Fidelity & Guaranty Company is suing the defendant Anderson Construction Co. to recover the balance alleged to be

due the plaintiff on the premiums for furnishing a performance bond and a payment bond to the United States Government for the defendant. The plaintiff claims that the unpaid balance of this premium is \$23,876.86. The defendant claims that the unpaid [296] balance of this premium is \$11,699.93, which it has tendered to plaintiff and paid into court.

The defendant Anderson Construction Co. is in the construction business. In 1955 it formed a joint venture with two other companies, namely Islands Construction Co. and Montin-Benson Co., to bid upon a contract with the United States for certain construction work upon an Air Force base in Alaska. This bid was accepted by the United States. In order to do the work, however, the members of the joint venture had to furnish the United States with a performance bond guaranteeing payment to the Government if they failed to perform their contract, and also a payment bond guaranteeing their payment of all claims for material and labor in connection with the project.

The plaintiff is a commercial insurance company in the business of furnishing such bonds for a fee. In about May, 1955, when the joint venture was bidding on the Government contract, the defendant applied to the plaintiff for the execution of a performance bond and a payment bond required by the Government. This application was handled for the plaintiff by McCollister & Company, insurance brokers, and by J. C. Beeson, Vice President of McCollister & Company. The McCollister Company

furnished the [297] defendant with plaintiff's printed form of application for such bonds and the defendant through its officers signed the application and delivered it to McCollister & Company for the plaintiff. Thereafter in June, 1955, the plaintiff executed the two bonds through J. C. Beeson as its attorney in fact. The bonds were delivered to the United States of America about June 17, 1955.

These bonds are still in effect. On the back of one of them is a recital that the premium paid for both bonds was \$47,753.72. At the time the defendant applied for the bonds and at the time they were executed by the plaintiff, the plaintiff had on file with the Insurance Commissioner of the State of Washington its schedule of premium rates for such bonds. If calculated according to the rates then on file, the premium on these bonds would be \$47,753.72.

On July 5, 1955, the plaintiff caused new revised premium rates to be filed with the Insurance Commissioner of the State of Washington which became effective on July 20, 1955. If calculated according to these new revised rates, the premium for the bonds furnished by the plaintiff would be \$35,576.79.

You are instructed that a joint venture is treated at law as a form of partnership, and that each [298] member of the joint venture is bound by the acts of the other member or members done within the scope of the joint venture.

It is the duty of those dealing with an agent to know of the nature and extent of his authority to

bind his principal. A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume or which he holds the agent out to the public as possessing.

You are instructed that the plaintiff in its business as a surety and in executing said bonds was and is subject to the Insurance Code of the State of Washington as then in force. You are instructed that the Insurance Code of the State of Washington is a public law of said state and among other things provides:

“Premium rates for insurance shall not be excessive, inadequate or unfairly discriminatory.

“Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates [299] and every rating plan as to surety insurance and every rating schedule, minimum rate, class rate and rating rule as to other insurances and every modification of any of the foregoing which it proposes.

“Where a filing is required, no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by another section of the law.

“If so authorized by an insurer, the Commissioner shall accept in lieu of filings by the insurer filings on its behalf made by the rating organization then licensed as provided in this particular article of this statute.

“Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization and shall not deviate therefrom except as provided in this section.

“Any person violating any provision of this article shall be subject to a penalty of not more than \$50.00 for each such violation, but if such violation is found [300] to be wilful, a penalty of not more than \$500.00 for each such violation may be imposed. Such penalties may be in addition to any other penalty provided by law.

“Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker or solicitor shall, as an inducement to insurance or after insurance has been effected, directly or indirectly offer, promise, allow, give, set off or pay to the insured or to any employee of the insured any rebate, discount, abatement or reduction of premium or any part thereof named in any insurance contract or any commission thereon or earnings, profits, dividends or other benefit or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.

“The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker or solicitor guilty of violating any provisions contained in * * *”—certain sections, naming [301] them. No such insurer, general agent, agent, broker or solicitor shall, following any such revocation, be eligible for a certificate of authority or license within one year after such revocation.

"No insured person shall receive or accept directly or indirectly any rebate or premium or part thereof or any favor, advantage, share in dividends or other benefits or any valuable consideration or inducement not specified or provided for in the policy or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker or solicitor."

I instruct you that there is nothing in the Insurance Code of the State of Washington which would render void a special contract for the extension of new rates to an earlier contract, if you find such contract was made.

The plaintiff contends that the defendant is liable for a total premium of \$47,753.72 on the basis of an account stated between the plaintiff and the defendant. An account stated is an agreement between parties who have had previously monetary [302] transactions that all the items of account representing such transactions and the balance struck are correct, together with a promise, express or implied, for the payment of such balance.

The rendering of an account by one party to another is not alone sufficient to make it an account stated. The crucial factor is whether the parties intended to agree upon the account so rendered. On one hand there must be evidence to show that the party sought to be charged has by his language or conduct admitted the correctness of the account.

If a person receiving an account statement keeps it beyond a reasonable time or makes payment upon

it without objecting to its accuracy, this may be evidence of his admission that the account is correct.

On the other hand, a person receiving an account statement does not admit its correctness even though he keeps it without protest where he has no knowledge or opportunity for knowledge of all the circumstances concerning the account, or where the account is at variance with a special contract between the parties.

If you find there is in this case an account stated as between plaintiff and defendant, then your [303] verdict should be for plaintiff, but if you find there was no account stated as I have just defined it, you will disregard this issue respecting account stated.

If from a preponderance of the evidence you find that J. C. Beeson advised the defendant that a bond rate reduction was under consideration by plaintiff and that defendant would get the benefit of any such rate reduction if the reduction was effected prior to the furnishing of the performance and payment bonds, but that if the bond rate was changed after the effective date of the bonds in question no reduction could be given defendant, then plaintiff would be entitled to recover. If, however, you are convinced that Mr. Beeson promised and agreed that if the bond rates were reduced as contemplated he would see to it that defendant got the benefit of such reduction without reference to the effective date of the bonds in question, then your verdict should be for the defendant.

You are the sole and exclusive judges of the

evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each.

In weighing the testimony of a witness you have a right to consider his demeanor upon the witness [304] stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions of the Court to be the law. You will consider such instructions as a whole and will not select any one of them and place undue emphasis on that one instruction.

If the Court has repeated or emphasized [305] more than another any instruction in whole or in part or has seemed to the jury to have done so,

you will disregard as unintended and without effect any such repetition or emphasis by the Court.

You will consider all evidence admitted by the Court and now before you, and you will disregard all evidence offered but not admitted by the Court and all evidence stricken out by the Court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by Counsel during the trial, and you should not allow the making of objections and the taking of exceptions by Counsel to influence or confuse you.

Statements, if any, by Counsel or the Court unsupported by your own recollection of the evidence you will disregard, and you will disregard all statements made by Counsel and the Court to each other during the trial.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of [306] the other and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice at your hands.

While it would be proper for me as the Trial

Judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

If you can conscientiously do so, you are expected to agree upon a verdict in this case. The matter that has been submitted to you for your consideration is an important and serious one, as are all cases submitted to juries. You should bring to your consideration of this case your earnest and honest endeavor to solve it justly and properly with [307] due regard to the rights of both the plaintiff and the defendant.

Let me say to you that you should freely consult with one another in the jury room after you retire to consider your verdict. If any one of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper for you to adhere to your own view if after a full exchange of ideas with your fellow jurors you still believe you are right.

I might add this further thought to the jurors by way of explanation of the present status of the case: Counsel in the case on both sides have

brought before the Court and jury all of the admissible evidence available to them to properly enable the jury and the Court to perform their respective functions. The Court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the Trial Judge what more could be done to properly enable the jury to perform its duty. You now have all the means necessary to a decision in this case.

In this court the instructions in written form are not sent to the jury room. Also, written [308] transcripts of the testimony orally stated from the witness stand will not be sent to the jury room. It is for the jury to remember the evidence and the Court's instructions.

Immediately upon your retiring to the jury room to consider your verdict you will select one of your number as foreman of the jury.

The pleadings in this case and the pretrial order will not be sent to the jury room, as the issues are simple and have been sufficiently explained during the course of the trial, during the arguments of Counsel and in the Court's instructions.

You will take with you to the jury room the admitted exhibits in the case, and you will also be given for your convenience in the jury room two forms of verdicts which the Clerk of the Court has prepared for your convenience. These verdicts are in the usual form in matters of this nature. One of them, as you will plainly see when you look at the two verdict forms, is for your use if you find for the plaintiff. It is called Verdict for

Plaintiff. And one of those two forms is a verdict form for you to use in case your verdict is for the defendant. Likewise that form can easily be identified by you upon observing the two verdict forms. This one, the last one mentioned by [309] the Court, the one for your use in case you find for the defendant, is entitled Verdict for Defendant.

When you reach your verdict, if the same is for the plaintiff, you will in that event have your foreman sign that verdict. If you find for defendant, you will in that event use the appropriate form provided therefor and have your foreman sign it. You will discard the form of verdict not used by you.

It is necessary that all of you agree on your verdict, and when so agreed upon you will cause your foreman to sign your verdict and return with it into open court. Nothing but a unanimous verdict, which is the verdict of each one and all twelve of you, will be received or accepted by the Court.

Counsel, have I overlooked anything?

(No response.)

The Court: If there are any exceptions to be noted by Counsel to the giving or failure to give requested instructions or to the giving of instructions, I shall, upon being so advised, temporarily excuse the jury from the jury box for that purpose, as the law provides shall be done in every case.

Does the plaintiff wish to note any exceptions?

Mr. LeGros: Yes, your Honor.

The Court: Does the defendant wish to note [310] any exceptions?

Mr. Palmer: Yes, your Honor.

The Court: Members of the jury, this case has not yet been submitted to you finally for your deliberation and verdict. That will be done later, not now. You are now being again, as in the past, temporarily, only temporarily excused from the jury box during another brief time. During that absence from the jury box do not discuss this case among yourselves or make any expression about it at all among each other. Your opportunity to do that and your duty to do that will be given you later, not now. It will be given you after this recess.

You may now temporarily retire from the jury box, subject to all of the Court's previous admonitions dealing with receiving information about or discussing this case.

(The following proceedings were had without the presence of the jury):

The Court: Now, in the absence of the jury, excused temporarily for that purpose, plaintiff's Counsel may note plaintiff's exceptions.

Mr. LeGros: If the Court please, comes now the plaintiff and notes its exceptions to the failure of the Court to give certain requested instructions and [311] to certain instructions as given by the Court.

First we wish to note an exception to the failure of the Court to direct a verdict for the plaintiff as asked for in one of the plaintiff's requested instructions.

The Court: Allowed.

Mr. LeGros: Secondly, if the Court please, we except—

The Court: Mr. LeGros, may I interrupt you. That was No. 15. This will be identified as 16.

Mr. LeGros: It is Requested Instruction 16.

Secondly, if the Court please—

The Court: The Court allows that exception.

Mr. LeGros: The plaintiff excepts to that instruction whereby the jury was instructed that such a special agreement as was testified to here is not a void contract.

That exception is based upon our consistent holding in this case as best set out in our filed exceptions to the affirmative defenses as contained in the pleadings, fully setting forth our views and contention on the Way case.

The Court: Allowed.

Mr. LeGros: Third, your Honor, the plaintiff excepts to that instruction stating that, "If, however, [312] you are convinced that Mr. Beeson agreed that if the board rates were reduced as contemplated he would see to it that the defendant got the benefit of such reduction without reference to the effective date of the bonds in question," we except on the same grounds as previously stated, that this instruction is based on the Way case and we have previously noted in this file and in this cause our objections to that case and our consideration of that case.

The Court: Allowed.

Mr. LeGros: Beyond that the plaintiff has no exceptions.

The Court: The defendant may now note in the record defendant's exceptions.

Mr. Palmer: Your Honor, the defendant objects first to the Court's instructions containing any mention of the Insurance Code of the State of Washington on the ground that in accordance with the memorandum which the defendant has previously furnished the Court which is on file concerning the Way case, the effect of the Insurance Code on a contract of this kind is a matter of law to be decided only by the Court, and while the Court has indicated in a portion of its instruction on the Insurance Code that the Code does not render the agreement in issue here void, nevertheless the remainder [313] of the Code which was inserted in the instructions at length is directed to criminal penalties and which have no application in this civil case and are prejudicial to the defendant.

The Court: Allowed.

Mr. Palmer: The defendant objects also, your Honor, to the inclusion in the instructions of any mention of account stated, on the ground that, as set forth in a memorandum of authorities heretofore furnished to the Court, the doctrine of account stated has no application in a case where the matter is governed by a special agreement between the parties.

The Court: Allowed.

Mr. Palmer: Other than that the defendant has no objections to the instructions, your Honor.

The Court: Is there anything else to be said in the absence of the jury before the final submission of the case to the jury for its deliberation of its verdict or which concerns any matter or thing which should be considered before that is done?

Mr. LeGros: The plaintiff asks for no further consideration.

Mr. Simon: The defendant likewise, your Honor.

The Court: Bring in the jury.

(The following proceedings [314] were had within the presence of the jury):

The Court: Let the record show that all of the jurors have returned to their places and are now in the jury box as before the recess and that all others are present as before the recess.

The Clerk will now swear the bailiffs.

(Two bailiffs were sworn by the clerk of court.)

The Court: Members of the jury, this case is now fully, finally and unreservedly submitted to the jury for its deliberation and verdict.

You the jury will now retire to the jury room to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the Court from further consideration of this case.

And just before retiring may I make a suggestion to you which is not an instruction on the law, it is a suggestion made for whatever value you may wish to attach to it and for whatever consideration, if any, you may wish to give it. It is not in any respect binding on you. It is merely a suggestion

for whatever you may think it is worth concerning the selection of your foreman. [315]

In connection with the selection by you from among your number of your foreman I suggest that you should indulge some of the considerations which may properly, and you have observed as proper, apply to the selection of a leader in any other activity in life. Do not select a foreman with a view to yielding to his views on the facts, but try to have in mind the ordinary qualifications of leadership and of acceptable and agreeable personality and ability to deal with others.

The position of foreman is one of responsibility and leadership, and a good foreman sometimes can by proper acts of leadership and without infringing upon the independence and responsibility of each juror separately so conduct and lead the hearings and deliberations and discussions among the jurors as to save time and help each and all of the members of the jury accomplish the greatest good and the most work in the most efficient and agreeable and proper manner merely by his qualifications of leadership.

I repeat, this is not in any way an instruction which in any way governs your thought or your action, it is merely for whatever consideration you may wish to give it.

The jury will now retire to deliberate and consider your verdict. [316]

(Thereupon, at 11:07 o'clock a.m., the jury retired to consider its verdict, and the follow-

ing proceedings were had without the presence of the jury):

The Court: I will not undertake to make any suggestion about remaining in court until the jury retires for lunch, but if it reaches a verdict before twelve o'clock you might wish that you had remained here and not had to spend the additional time of coming here from your office. However, as to how you will manage that I will leave in your hands, but if you do leave this floor of the building will you not please let the bailiff know very accurately where you can be reached on the phone at any and every minute during your absence from this floor until this jury is discharged from further consideration of this case so that in case you wish to be advised that the jury is ready to report its verdict you can be so advised and can thereafter get here with the shortest possible lapse of time. Is that agreeable with Counsel?

Mr. LeGros: Yes, your Honor. If the Court please, if by twelve o'clock a verdict is not reached are we to assume then the jury will go to lunch and we will be free from—

The Court: They will be invited to go to lunch.

Mr. LeGros: Yes.

The Court: The jury might say, "We do not wish to go to lunch. We will continue our deliberations." In that case the Court will not at least for a while insist upon their doing so. The Court usually sends word to the jurors that we usually think it best to take refreshment about this time of day and it might work to the jury's advantage

to do so, and after which they will come back and resume their deliberations. However, sometimes juries do not accept that advice. Have you any objection to the Court so advising the jury about that time, about twelve o'clock?

Mr. LeGros: I would be most surprised if they did not accept the Court's suggestion.

The Court: Have you any objection to the Court so advising them?

Mr. LeGros: No, your Honor.

The Court: Have you?

Mr. Simon: Nor do we, your Honor.

The Court: But to meet the situation if it should unintentionally arise of being unable to contact Counsel or Counsel being unable for some reason or other to get here promptly,—repeating—did you hear what I said, Mr. LeGros?

Mr. LeGros: Yes, your Honor. [318]

The Court: Then not repeating, do Counsel for each side stipulate in the record that this Court may receive this jury's verdict in the absence of Counsel, it being a civil case and since the law does not require or place upon the Court a positive duty to give to Counsel or the parties an opportunity to be here and since if in a civil case like this the parties wish to be here they should remain in attendance for that purpose?

Mr. LeGros: I am willing to stipulate that the verdict may be received in the absence of Counsel.

Mr. Simon: The defendant will likewise so stipulate.

The Court: Let the record show that. I wish

to add, Counsel, that the Court will do everything it can to advise Counsel so they can get here if they want to.

Mr. LeGros: Thank you, your Honor.

Mr. Simon: Thank you very much.

(Thereupon, at 11:10 o'clock a.m., Friday, May 17, 1957, an adjournment herein was had.)

[Endorsed]: Filed Aug. 19, 1957.

[Endorsed]: No. 15681. United States Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a corporation, Appellant, vs. Anderson Construction Co., Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: August 22, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15681

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation,

Appellee.

APPELLANT'S STATEMENT
OF POINTS

The appellant in its appeal intends to rely upon the following points:

1. That the alleged oral agreement whereby the appellant would accept and the appellee would pay for surety bonds a premium less than that fixed by the applicable legal rate as filed with and approved by the Insurance Commissioner of the State of Washington was void because expressly prohibited by statutes of the State of Washington.
2. That the appellant's agent had no authority, express or implied, to bind the appellant upon any illegal agreement prohibited by statute whereby the appellant would accept and the appellee would pay any premium other than the lawful premium for the surety bonds involved.
3. That the appellant is entitled to recover upon

the basis of an "account stated" between the appellant and the appellee.

4. That the District Court erred in denying appellant's motion for judgment notwithstanding the verdict upon the ground that all of the evidence established the existence in law and in fact of an "account stated" upon which appellant was entitled to recover. (Dist. Ct. Documents #42, #43.)

5. That the District Court erred in denying appellant's motion for judgment notwithstanding the verdict upon the ground that no evidence tended to show either J. C. Beeson or McCollister & Co., Inc., was ever given by the appellant any authority, either express or apparent, to enter into any agreement prohibited by the statutes of the State of Washington whereby the appellant would charge and the appellee would pay less than the legal premium for the surety bonds involved. (Dist. Ct. Documents #42; #43.)

6. That the District Court erred in denying appellant's motion for judgment notwithstanding the verdict upon the ground that all of the evidence established that the appellant gave no authority, either express or apparent, to J. C. Beeson or McCollister & Co., Inc., to enter into any contract giving appellee any premium rate other than that established by law. (Dist. Ct. Documents #42; #43.)

7. That the District Court erred in denying appellant's motion for new trial upon the ground of

its error in refusing to give appellant's requested instruction for a directed verdict in its favor. (Dist. Ct. Documents #42; #43; #37; #47, Reporter's Transcript, pp. 311, 312.)

8. That the District Court erred in denying appellant's motion for new trial upon the ground of its error in overruling appellant's exceptions to the appellee's affirmative defense based upon the alleged special agreement for an illegal lower premium. (Dist. Ct. Documents #42; #43.)

9. That the District Court erred in denying appellant's motion for new trial upon the ground of its error in instructing the jury that the alleged special agreement for an illegal lower premium, if made, would not be void as a matter of law. Dist. Ct. Documents #42; #43; #47, Reporter's Transcript, pp. 302, 312.)

10. That the District Court erred in denying the appellant's motion for new trial upon the ground of its error in instructing the jury that if the alleged special agreement for an illegal lower premium was made, the jury's verdict should be for the appellee. Dist. Ct. Documents #42; #43; #47, Reporter's Transcript, pp. 304, 312, 313.)

/s/ LANE SUMMERS,
/s/ THEODORE A. LeGROS,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 23, 1957. Paul P. O'Brien, Clerk.